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June 1917

HORNBOOK CASE SERIES

ILLUSTRATIVE CASES
ON
CONTRACTS

By ARCHIBALD H. THROCKMORTON

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A COMPANION BOOK TO THE SECOND EDITION
OF CLARK ON CONTRACTS

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THE HORNBOOK CASE SERIES

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HORNBOOK CASES

ON THE

LAW OF CONTRACTS

DEFINITION, NATURE, AND REQUISITES OF CONTRACT IN GENERAL

I. Agreement¹

WHITE v. CORLIES.

(Court of Appeals of New York, 1871. 46 N. Y. 467.)

The action was for an alleged breach of contract.

The plaintiff was a builder with his place of business in Fortieth street, New York City.

The defendants were merchants at 32 Dey street.

In September, 1865, the defendants furnished the plaintiff with specifications, for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September 28th the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff, for his assent under his estimate, which he assented to by signing the same and returning it to the defendants.

On the day following, the defendants' bookkeeper wrote the plaintiff the following note:

"New York, September 29th. Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once. The writer will call again, probably between 5 and 6 this p. m. W. H. R., for J. W. Corlies & Co., 32 Dey street."

¹ For discussion of principles, see Clark on Contracts (2d Ed.) § 3.

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September 29th, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey street (meaning to give notice of assent) before commencing the work. In my opinion it was not. He had a right to act upon this note and commence the job, and that was a binding contract between the parties."

To this defendants excepted.

•FOLGER, J. We do not think that the jury found, or that the testimony shows that there was any agreement between the parties before the written communication of the defendants of September 30 was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound in contract to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work as we understand the testimony, upon that stuff.

We understand the rule to be that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal may be answered by letter by mail containing the acceptance. And in general as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which in itself is no indication of an acceptance, become such because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve

to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed and a new trial ordered, with costs to abide the event of the action. All concur, but ALLEN, J., not voting.

Judgment reversed, and new trial ordered.

II. Obligation *

GORHAM'S ADM'R v. MEACHAM'S ADM'R.

(Supreme Court of Vermont, 1891. 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676.)

Bill by A. W. Gorham, administrator of the estate of Angeline W. Gorham, against R. S. Meacham's administrator, to foreclose a mortgage.

TYLER, J.² The following facts are reported: Rollins S. Meacham, in his lifetime, was administrator with the will annexed of the estate of Angeline W. Gorham, and became largely indebted to the estate for moneys that had come into his hands as such administrator. For the purpose of securing the estate for this indebtedness, on March 1, 1889, he made and executed a promissory note for \$1,550, payable to himself as administrator on demand, and in like manner a mortgage of his home place, conditioned for the payment of the note. He never settled the estate, nor rendered any account to the probate court. He converted the assets into money, and appropriated it to his own use in his private business. At the time the note and mortgage were executed, and at his decease, he was indebted to the estate to the amount of \$7,000, and was insolvent. His debts, besides what he owed the estate, amounted to about \$9,000, and his assets to about \$4,000. The

* For discussion of principles, see Clark on Contracts (2d Ed.) § 4.

² A portion of the opinion is omitted.

note and mortgage were retained by him, and were found after his decease in his safe among other papers that belonged to the estate, and among certain deeds and mortgages of his own. He died November 17, 1889. His wife was the daughter of the testatrix, and is the only person interested in her estate. After Meacham's decease, the defendant, as his administrator, handed the note and mortgage to Burditt, after the latter's appointment as administrator upon the estate of Mrs. Gorham, and Burditt caused the mortgage to be recorded in the town-clerk's office. The question is as to its validity.

— The mortgage must be held invalid for want of contracting parties. A contract necessarily implies a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. One person cannot by his promise confer a right against himself until the person to whom the promise is made has accepted the same. Until the concurrence of the two minds, there is no contract; there is merely an offer which the promisor may at any time retract. Chitty, Cont. 9, quoting Poth. Obl. It is essential to the validity of a deed that there be proper parties,—a person able to contract, and a person able to be contracted with. 3 Washb. Real Prop. 217. To uphold this mortgage, we must say that there may be two distinct persons in one; for in law the mortgagor and mortgagee are identical. The addition of the words "executor of A. W. Gorham's estate" does not change the legal effect of the grant, which is to Meacham in his individual capacity. In 3 Washb. Real Prop. 279, it is said that a grant to A., B., and C., trustees of a society named, their heirs, etc., is a grant to them individually; and *Austin v. Shaw*, 10 Allen (Mass.) 552; *Towar v. Hale*, 46 Barb. (N. Y.) 361; *Combs v. Brown*, 29 N. J. Law, 36,—are cited.

In this case the grant and the habendum are not to the estate and its legal representatives, but to Meacham, executor, his heirs and assigns. Meacham had misappropriated the funds of the estate, and no one but himself assented to his giving a note and mortgage for the purpose of partially covering his default. * * *

OFFER AND ACCEPTANCE

I. Communication by Conduct—Implied Contracts ¹

HERTZOG v. HERTZOG.

(Supreme Court of Pennsylvania, 1857. 29 Pa. 465.)

This suit was brought by John Hertzog to recover from the estate of his father compensation for services rendered the latter in his lifetime, and for money lent. The plaintiff was twenty-one years of age about the year 1825, but continued to reside with his father, who was a farmer, and to labour for him on the farm except one year that he was absent in Virginia, until 1842, when the plaintiff married and took his wife to his father's, where they continued for some time as he had done before. His father then put him on another farm which he owned, and some time afterwards the father and his wife moved into the same house with John, and continued to reside there until his death in 1849.

The testimony of Adam Stamm and Daniel Roderick was relied on to prove a contract or agreement on the part of George Hertzog to pay for the services of plaintiff.

Adam Stamm affirmed: "John laboured for his father. All worked together. The old man got the proceeds. I know the money from the grain went to pay for the farm. The old man said so. John's services worth \$12 per month; the wife's worth \$1 per week, beside attending to her own family. I heard the old man say he would pay John for the labour he had done."

Daniel Roderick sworn: "John Hertzog requested him to see his father about paying him for his work, which he had done and was doing, and stated that he had frequently spoken to the old man, his father, about it, and he had still put him off. He agreed to see him, and thinks it was in June, 1849. Coming from Duncan's Furnace, he spoke to the old man about paying John for his work. He said he intended to make John safe. John spoke to me in the spring of 1848. The old man died in August, 1849, I think."

Verdict and judgment for plaintiff, and writ of error awarded the defendant.

LOWRIE, J.² "Express contracts are, where the terms of the agreement are openly uttered and avowed at the time of the making; as,

¹For discussion of principles, see Clark on Contracts (2d Ed.) §§ 14, 15.

²The statement of facts is abridged and a portion of the opinion is omitted.

to deliver an ox or ten loads of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate; and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook and contracted to pay him as much as his labour deserves. If I take up wares of a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."

This is the language of Blackstone (2.Comm. 443), and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

But it appears in another place (3 Bl. Comm. 159-166) that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in *assumpsit*.

It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty.

We have, therefore, in law three classes of relations called contracts:

1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

3. Express contracts, already sufficiently distinguished.

In the present case there is no pretence of a constructive contract, but only of a proper one, either express or implied. And it is scarcely insisted that the law would imply one in such a case as this; yet we may present the principle of the case the more clearly, by showing why it is not one of implied contract.

The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbours for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and therefore, by common custom, compensation is mutually counted on in one case, and in the other not.

On the same principle the law presumes that the exclusive possession of land by a stranger to the title is adverse, unless there be some family or other relation that may account for it. And such a possession by one tenant in common is not presumed adverse to his co-tenants, because it is, *prima facie*, accounted for by the relation. And so of possession of land by a son of the owner. And in *Magaw's Case*, Latch, 168, where an heir was in a foreign land at the time of a descent cast upon him, and his younger brother entered, he was presumed to have entered for the benefit of the heir. And one who enters as a tenant of the owner is not presumed to hold adversely even after his term has expired. In all such cases, if there is a relation adequate to account for the possession, the law accounts for it by that relation, unless the contrary be proved. A party who relies upon a contract must prove its existence; and this he does not do by merely proving a set of circumstances that can be accounted for by another relation appearing to exist between the parties.

Mr. Justice Rogers is entitled to the gratitude of the public for having, in several cases, demonstrated the force of this principle in interpreting transactions between parents and children (*Zeigler v. Fisher's Heirs*, 3 Pa. 365; *In re Walker's Estate*, 3 Rawle, 249; *Swires v. Parsons*, 5 Watts & S. 357; *Candor v. Candor*, 5 Watts & S. 513); and he has been faithfully followed in many other cases. *Cummings v. Cummings*, 8 Watts, 366; *Hack v. Stewart*, 8 Pa. 213; *Bash v. Bash*, 9 Pa. 262; *Hugus v. Walker*, 12 Pa. 175; *Lantz v. Frey*, 14 Pa. 201; *Sanders v. Wagonseller*, 19 Pa. 251, 366; *McCue*

v. Johnston, 25 Pa. 308; *Poorman v. Kilgore*, 26 Pa. 372, 67 Am. Dec. 524; *Cox v. Cox*, 26 Pa. 383, 67 Am. Dec. 432.

Every induction, inference, implication, or presumption in reasoning of any kind is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not. If we find, as ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require this inference.

But if we find a son in the employment of his father, we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association, and does not demand the inference of a contract. And besides this, the position of a son in a family is always esteemed better than that of a hired servant, and it is very rare for sons remaining in their father's family, even after they arrive at age, to become mere hired servants. If they do not go to work or business on their own account, it is generally because they perceive no sufficient inducement to sever the family bond, and very often because they lack the energy and independence necessary for such a course; and very seldom because their father desires to use them as hired servants. Customarily no charges are made for boarding and clothing and pocket money on one side, or for work on the other; but all is placed to the account of filial and parental duty and relationship.

Judging from the somewhat discordant testimony in the present case, this son remained in the employment of his father until he was about forty years old; for we take no account of his temporary absence. While living with his father, in 1842, he got married, and brought his wife to live with him in the house of his parents. Afterwards his father placed him on another farm of the father, and very soon followed him there, and they all lived together until the father's death in 1849. The farm was the father's and it was managed by him and in his name, and the son worked on it under him. No accounts were kept between them, and the presumption is that the son and his family obtained their entire living from the father while they were residing with him.

Does the law, under the circumstances, presume that the parties mutually intended to be bound, as by contract, for the service and compensation of the son and his wife? It is not pretended that it does. But it is insisted that there are other circumstances besides these, which, taken together, are evidence of an express contract for compensation in some form, and we are to examine this.

In this court it is insisted that the contract was that the farm should be worked for the joint benefit of the father and son, and that the

profits were to be divided; but there is not a shadow of evidence of this. And moreover it is quite apparent that it was wages only that was claimed before the jury for the services of the son and his wife, and all the evidence and the charge point only in that direction. There was no kind of evidence of the annual products.

Have we, then, any evidence of an express contract of the father to pay his son for his work or that of his wife? We concede that, in a case of this kind, an express contract may be proved by indirect or circumstantial evidence. If the parties kept accounts between them, these might show it. Or it might be sufficient to show that money was periodically paid to the son as wages; or, if there be no creditors to object, that a settlement for wages was had, and a balance agreed upon. But there is nothing of the sort here.

The court told the jury that a contract of hiring might be inferred from the evidence of Stanm and Roderick. Yet these witnesses add nothing to the facts already recited, except that the father told them, shortly before his death, that he intended to pay his son for his work. This is no making of a contract or admission of one; but rather the contrary. It admits that the son deserved some reward from his father, but not that he had a contract for any.

And when the son asked Roderick to see the father about paying him for his work, he did not pretend that there was any contract, but only that he had often spoken to his father about getting pay, and had always been put off. All this makes it very apparent that it was a contract that was wanted, and not at all that one already existed; and the court was in error in saying it might be inferred, from such talk, that there was a contract of any kind between the parties.

The difficulty in trying causes of this kind often arises from juries supposing that, because they have the decision of the cause, therefore they may decide according to general principles of honesty and fairness, without reference to the law of the case. But this is a despotic power, and is lodged with no portion of this government.

Their verdict may, in fact, declare what is honest between the parties, and yet it may be a mere usurpation of power, and thus be an effort to correct one evil by a greater one. Citizens have a right to form connexions on their own terms and to be judged accordingly. When parties claim by contract, the contract proved must be the rule by which their rights are to be decided. To judge them by any other rule is to interfere with the liberty of the citizen. * * *

Judgment reversed, and a new trial awarded.

II. Necessity and Effect of Acceptance³

PRESCOTT v. JONES et al.

(Supreme Court of New Hampshire, 1898. 69 N. H. 305, 41 Atl. 352.)

Assumpsit by Charles W. Prescott against Jones & Perry. Defendants demur to the declaration.

The declaration alleged, in substance, that the defendants, as insurance agents, had insured the plaintiff's buildings in the Manchester Fire Insurance Company until February 1, 1897; that they notified him, January 23, 1897, that they would renew the policy, and insure his buildings for a further term of one year from February 1, 1897, in the sum of \$500, unless notified to the contrary by him; that he, relying on the agreement to insure his buildings unless notified to the contrary, and believing, as he had the right to believe, that his buildings would be and were insured by them from said February 1st for one year, gave no notice to them to insure or not to insure said buildings; yet they did not insure the buildings as they had agreed, and did not notify or inform him of their intention not to do so, and the buildings were destroyed by fire March 1, 1897, without fault on his part.

BLODGETT, J. While an offer will not mature into a complete and effectual contract until it is acceded to by the party to whom it is made, and notice thereof, either actual or constructive, given to the maker (*Abbott v. Shepard*, 48 N. H. 14, 17; *Perry v. Insurance Co.*, 67 N. H. 291, 294, 295, 33 Atl. 731, 68 Am. St. Rep. 668), it must be conceded to be within the power of the maker to prescribe a particular form or mode of acceptance; and, the defendants having designated in their offer what they would recognize as notice of its acceptance, namely, failure of the plaintiff to notify them to the contrary, they may properly be held to have waived the necessity of formally communicating to them the fact of its acceptance by him. But this did not render acceptance on his part any less necessary than it would have been if no particular form of acceptance had been prescribed, for it is well settled that "a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it." *Clark*, Cont. 31, 32. "A person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance or there is no contract." *More v. Insurance Co.*, 130 N. Y. 537, 547, 29 N. E. 757, 759. And to con-

³ For discussion of principles, see *Clark on Contracts* (2d Ed.) § 17.

stitute acceptance "there must be words, written or spoken, or some other overt act." Bish. Cont. § 183, and authorities cited.

If, therefore, the defendants might and did make their offer in such a way as to dispense with the communication of its acceptance to them in a formal and direct manner, they did not and could not so frame it as to render the plaintiff liable as having accepted it, merely because he did not communicate his intention not to accept it. And if the plaintiff was not bound by the offer until he accepted it, the defendants could not be, because "it takes two to make a bargain," and, as contracts rest on mutual promises, both parties are bound or neither is bound. The inquiry as to the defendants' liability for the nonperformance of their offer thus becomes restricted to the question, did the plaintiff accept the offer so that it became by his action clothed with legal consideration, and perfected with the requisite condition of mutuality? As, in morals, one who creates an expectation in another by a gratuitous promise is doubtless bound to make the expectation good, it is perhaps to be regretted that upon the facts before us we are constrained to answer the question in the negative. While a gratuitous undertaking is binding in honor, it does not create a legal responsibility.

Whether wisely and equitably or not, the law requires a consideration for those promises which it will enforce, and, as the plaintiff paid no premium for the policy which the defendants proposed to issue, nor bound himself to pay any, there was no legal consideration for their promise, and the law will not enforce it. Then, again, there was no mutuality between the parties. All the plaintiff did was merely to determine in his own mind that he would accept the offer, for there was nothing whatever to indicate it by way of speech or other appropriate act. Plainly, this did not create any rights in his favor as against the defendants. From the very nature of a contract this must be so, and it therefore seems superfluous to add that the universal doctrine is that an uncommunicated mental determination cannot create a binding contract.

Nor is there any estoppel against the defendants on the ground that the plaintiff relied upon their letter, and believed they would insure his buildings as therein stated. The letter was a representation only of a present intention or purpose on their part. "It was not a statement of a fact or state of things actually existing, or past and executed, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct. * * * The intent of a party, however positive or fixed concerning his future action, is necessarily uncertain as to its fulfillment, and must depend on contingencies, and be subject to be changed and modified by subsequent events and circumstances. * * * On a representation concerning such a matter no person would have a right to rely, or to regulate his action in relation to any subject in which his interest was involved as upon a fixed, certain, and definite fact or state of things, permanent in its nature, and not liable to change. * * * The doctrine of estop-

pel * * * on the ground that it is contrary to a previous statement of a party, does not apply to such a representation. The reason on which the doctrine rests is that it would operate as a fraud if a party was allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and alter his condition, to his prejudice, on the faith of such previous statement. But the reason wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain, and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action." *Langdon v. Doud*, 10 Allen (Mass.) 433, 436, 437; *Jackson v. Allen*, 120 Mass. 64, 79; *Jorden v. Money*, 5 H. L. Cas. 185. "An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." *Insurance Co. v. Mowry*, 96 U. S. 544, 547, 548, 24 L. Ed. 674. "The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention by the person with whom he is dealing." See, in addition, *White v. Ashton*, 51 N. Y. 280; *Mason v. Bridge Co.*, 28 W. Va. 639, 649; *Jones v. Parker*, 67 Tex. 76, 81, 82, 3 S. W. 222; *Bigelow, Estop.* (5th Ed.) 574.

To sum it up in a few words, the case presented is, in its legal aspects, one of a party seeking to reap where he had not sown, and to gather where he had not scattered. Demurrer sustained.

III. Communication of Acceptance ⁴

HOUSEHOLD FIRE & CARRIAGE ACC. INS. CO., Limited, v. GRANT.

(Court of Appeal, 1879. 4 Exch. Div. 216.)

Action to recover £94. 15s., being the balance due upon 100 shares allotted to the defendant on the 25th of October, 1874, in pursuance of an application from the defendant for such shares, dated the 30th of September, 1874. At the trial before Lopes, J., during the Middlesex sittings, 1878, the following facts were proved:

In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for shares in the plaintiff's company, which stated that the defendant

⁴ For discussion of principles, see *Clark on Contracts* (2d Ed.) §§ 18-20.

had paid to the bankers of the company £5, being a deposit of 1s. per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 79s. per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company, on the 20th of October, 1874, made out the letter of allotment in favour of the defendant, which was posted addressed to the defendant at his residence, 16 Herbert street, Swansea, Glamorganshire. His name was then entered on the register of shareholders.

This letter of allotment never reached the defendant. The defendant never paid the £5 mentioned in his application but, the plaintiffs' company being indebted to the defendant in the sum of £5 for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of 2½ per cent. was declared on the shares, and in February, 1876, a further dividend at the same rate. These dividends, amounting altogether to the sum of 5s., were also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay, on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury: (1) Was the letter of allotment of the 20th of October in fact posted? (2) Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative. The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of *Dunlop v. Higgins*, 1 H. L. Cas. 381.

The defendant appealed.

THESIGER, L. J.⁵ In this case the defendant made an application for shares in the plaintiffs' company, under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances, Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this court.

The leading case upon the subject is *Dunlop v. Higgins*, 1 H. L. Cas. 381. It is true that Lord Cottenham might have decided that

⁵ The concurring opinion of Baggallay, L. J., and the dissenting opinion of Bramwell, L. J., are omitted.

case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so, the court is as much bound to apply that principle, constituting as it did a *ratio decidendi*, as it is to follow the exact decision itself. The exception was that the lord justice general directed the jury in point of law that, if the pursuers posted their acceptance of the offer in due time, according to the usage of trade they were not responsible for any casualties in the post office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonour posted by the holder of a bill of exchange in proper time, in which case he said (1 H. L. Cas., at page 399): "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered.

My view of the effect of *Dunlop v. Higgins*, 1 H. L. Cas. 381, is that taken by James, L. J., in *Harris' Case*, L. R. 7 Ch. 587. There, at page 592, he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the lord chancellor in giving judgment." He adds, the lord chancellor "arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it." Mellish, J., also took the same view. He says, at page 595: "In *Dunlop v. Higgins*, 1 H. L. Cas. 381, the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindsell*, 1 Barn. & Ald. 681. The house of lords approved of the ruling of that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of a bill of exchange notice of dishonour, given by putting a letter into the post at the right time, had been held quite sufficient whether that letter was delivered or not; and he referred to *Stocken v. Collin*, 7 Mees. & W. 515, on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case of *Adams v. Lindsell*, 1 Barn. & Ald. 681, and quoted the observation of Lord Ellenborough, C. J. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post."

Leaving Harris' Case, L. R. 7 Ch. 587, for the moment, I turn to *Duncan v. Topham*, 8 C. B. 225, in which Cresswell, J., told the jury that if the letter accepting the contract was put into the post office and lost by the negligence of the post office authorities, the contract would nevertheless be complete; and both he and Wilde, C. J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in *Dunlop v. Higgins*, 1 H. L. Cas. 381. That opinion therefore appears to me to constitute an authority directly binding upon us. But if *Dunlop v. Higgins*, 1 H. L. Cas. 381, were out of the way, Harris' Case, L. R. 7 Ch. 587, would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retraction of the offer being of effect after the acceptance has been posted.

Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of *Adams v. Lindsell*, 1 Barn. & Ald. 681, which is recognized authority upon this branch of the law. But on the other hand it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How, then, are these elements of law to be harmonized in the case of contracts formed by correspondence through the post?

I see no better mode than that of treating the post office as the agent of both parties, and it was so considered by Lord Romilly in *Hebb's Case*, L. R. 4 Eq., at page 12, when in the course of his judgment he said: "*Dunlop v. Higgins*, 1 H. L. Cas. 381, decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is that the post office is the common agent of both parties." Alderson, B., also in *Stocken v. Collin*, 7 Mees. & W., at page 516,—a case of notice of dishonour, and the case referred to by Lord Cottenham,—says: "If the doctrine that the post office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put

his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance.

What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in *Telegraph Co. v. Colson*, L. R. 6 Exch. 108, which was a case directly on all fours with the present, and in which Kelly, C. B., at page 115, is reported to have said: "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance, and not from the subsequent notification of it. As in the case now before the court, if the letter of allotment had been delivered to the defendant in the due course of the post, he would have become a shareholder from the date of the letter. And to this effect is *Potter v. Sanders*, 6 Hare, 1. And hence perhaps the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified."

But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or, to put the question in the form in which it is put by Mellish, L. J., in *Harris' Case*, 7 Ch. App. 587, at page 596, how there can be any relation back in a case of this kind as there may be in bankruptcy. If, as the lord justice said, the contract, after the letter has arrived in time, is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. The principle indeed laid down in *Harris' Case*, 7 Ch. App. 587, at page 596, as well as in *Dunlop v. Higgins*, 1 H. L. Cas. 381, can really not be reconciled with the decision in *Telegraph Co. v. Colson*, L. R. 6 Exch. 108. James, L. J., in the passage I have already quoted,—*Harris' Case*, L. R. 7 Ch. 592,—affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers with approval to *Hebb's Case*, L. R. 4 Eq. 9. There a distinction was taken by the master of the rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it; but he at the same time assumed that if, instead of sending it through an authorized agent, they had sent it through the post office, the applicant would have been bound although the letter had never been delivered. Mellish, L. J., really goes as far, and states forcibly the reasons in favour of this view. The mere suggestion thrown out at the close of his judgment, at page 597, when stopping short of actually overruling the decision in *Telegraph Co. v. Colson*, L. R. 6 Exch. 108, that although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive

in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract, as he says, at page 596, is actually made when the letter is posted.

The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in *Brogden v. Directors of Metropolitan Railway Co.*, 2 App. Cas. 666, 691, "put it out of his control, and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound." How, then, can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in nondelivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer; and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the supreme court of the United States in *Tayloe v. Insurance Co.*, 9 How. 390, 13 L. Ed. 187, more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on

the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.

IV. Character, Mode, Place, and Time of Acceptance⁶

ELIASON et al. v. HENSHAW.

(Supreme Court of the United States, 1819. 4 Wheat. 225, 4 L. Ed. 556.)

WASHINGTON, J. This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you \$9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer."

This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distant about 20 miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed to the plaintiffs at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening.

⁶ For discussion of principles, see Clark on Contracts (2d Ed.) § 21.

I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at \$9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown, some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury, that, if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of \$9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given.

The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for? If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was, at that time, in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon, in traveling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer, and, therefore, it was entirely

unimportant, whether it was sent by that, or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs, at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument, that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties; and the court ought, therefore, to have given the instruction to the jury, which was asked for.

Judgment reversed. Cause remanded, with directions to award a *venire facias de novo*.

V. Revocation of Offer ¹

IDE v. LEISER.

(Supreme Court of Montana, 1890. 10 Mont. 5, 24 Pac. 695,
24 Am. St. Rep. 17.)

The plaintiff pleads the following instrument in writing:

"For and in consideration of one dollar (\$1.00) to me in hand paid, I hereby agree to give Frank L. Ide the sole right and option to purchase from me at any time within ten days from the date of this instrument the following described property, to-wit, [describing the property.] I furthermore agree to furnish a good and sufficient deed of conveyance of said property, and of the whole thereof. The price

¹ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 22, 23.

of said property to be one thousand dollars, (\$1,000.) Helena, Montana, September 24, 1889. J. J. Leiser.

"I hereby extend the above option for a period of ten days from this date. Helena, Oct. 3rd, 1889. J. J. Leiser."

The complaint further sets forth that on October 11, 1889, the plaintiff tendered defendant \$1,000, and demanded a conveyance of the property; that defendant refused to give the conveyance and still refuses; that plaintiff is still willing to pay said \$1,000. Plaintiff demands judgment that defendant make conveyance to him of the real estate described. The defendant demurred to the complaint on the ground that it did not set forth facts sufficient to constitute a cause of action. Demurrer was sustained, and judgment entered for the defendant. Plaintiff appeals from the judgment.

The question raised by the record, and discussed by counsel, is whether the instrument in writing pleaded, and the tender of \$1,000 by plaintiff to defendant, October 11, 1889, are sufficient to entitle plaintiff to a conveyance as demanded. No tender of money or demand for a deed was made during the 10 days limited in the original instrument; but were made during the period defined in the extension indorsed on the instrument.

DE WITT, J.,^a (after stating the facts as above.) For convenience of terms we will designate the original document pleaded as the first instrument, and the option therein as the first option, and the indorsement extending the time as the second instrument and option. We will not discuss the validity of the first instrument as a foundation for an action for specific performance. We will assume, for the purpose of this decision, that it is good. The option assumed to be granted therein was not exercised within the time limited, and expired October 4. The consideration for this option was one dollar, whether paid by Ide to Leiser, or still a debt owing from Ide to Leiser, is immaterial. That consideration was exhausted by the expiration of the option on October 4. Ide paid his money, the one dollar, and received his goods, the option. Leiser took the one dollar, and delivered a consideration therefor, viz., the option. The transaction was complete, and the terms performed by each party to the agreement.

We come to the second instrument and option. No consideration is named therein, specifically or by reference. The consideration for the first option cannot do service for the second. That consideration was *functus officio* in the first instrument. A consideration determined by the parties to be the consideration for the sale of one article on one day, and so declared in writing, cannot, in the face of such declaration, be construed by the court as a declaration for the sale of another article on another day. The first 10 days' option was a thing of value, and paid for as such. The second was another separate valuable article. Was there any consideration for its sale? We be-

^a A portion of the opinion is omitted.

lieve the same definitions and distinctions will aid this discussion. There may be (1) a sale of lands; (2) an agreement to sell lands; and (3) what is popularly called an "option."

The first is the action transfer of title from grantor to grantee by appropriate instrument of conveyance. The second is a contract to be performed in the future, and if fulfilled results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur by which the contemplated sale never takes place. The third, an option originally, is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not then agree to sell it; but he does then sell something, viz., the right or privilege to buy at the election or option of the other party. The second party gets, in *præsentî*, not lands, or an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or rather, from his point of view, he receives the right to elect to buy. That which the second party receives is of value, and in times of rapid inflations of prices, perhaps of great value.

A contract must be supported by a consideration, whether it be the actual sale of lands, an agreement to sell lands, or the actual sale of the right to demand the conveyance of lands. A present conveyance of lands is an executed contract. An agreement to sell is an executory contract. The sale of an option is an executed contract; that is to say, the lands are not sold; the contract is not executed as to them; but the option is as completely sold and transferred in *præsentî* as a piece of personal property instantly delivered on payment of the price. Now this option, this article of value and of commerce, must have a consideration to support its sale. As it is distinct from a sale of lands, or an agreement to sell lands, so its consideration must be distinct; although, if a sale of the lands afterwards follows the option, the consideration for the option may be agreed to be applied, and often is, as a part payment on the price of the land. But there must be some consideration upon which the finger may be placed, and of which it may be said, "This was given by the proposed vendee to the proposed vendor of the lands as the price for the option, or privilege to purchase."

We have been led into this endeavor to make clear our views of these distinctions, because, in the argument, counsel did not seem to give them as much weight as they seem to us to demand. We refer to the following authorities: *Gordon v. Darnell*, 5 Colo. 302; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195; *Railroad Co. v. Bartlett*, 3 Cush. (Mass.) 224; *Bean v. Burbauk*, 16 Me. 458, 33 Am. Dec. 681; *De*

Rutte v. Muldrow, 16 Cal. 505; Johnston v. Trippe (C. C.) 33 Fed. 530; Thomason v. Dill, 30 Ala. 444; Mers v. Insurance Co., 68 Mo. 127; Thorne v. Deas, 4 Johns. (N. Y.) 84; Burnet v. Biscoe, 4 Johns. (N. Y.) 235; Lees v. Whitcomb, 5 Bing. 34; Bish. Cont. §§ 77, 78; McDonald v. Bewick, 51 Mich. 79, 16 N. W. 240; Schroeder v. Gemeinder, 10 Nev. 356; Woodruff v. Woodruff, 44 N. J. Eq. 355, 16 Atl. 4, 1 L. R. A. 380; Perkins v. Hadsell, 50 Ill. 216; Wat. Spec. Perf. § 200.

Examine the two options granted in the case before us. L. sold I. an option for 10 days from September 24th for one dollar. He then gives an option for another 10 days from October 3d, for what? For nothing. L. transfers this option, this incorporeal valuable something, for nothing. The transfer of the option was nudum pactum, and void. But, the point just discussed being conceded, appellant still contends that this second instrument or option was a continuing offer to sell, at a given price, and was accepted by respondent before retracted, and that such acceptance, evidenced by, and accompanied with, the tender of the price, and demand for a deed, constitute an agreement to sell land, which may be enforced in equity. We leave behind now our views of options, and consideration therefor, and meet a wholly different proposition.

Reading the two instruments together we find that on October 3d L. extended to I. an offer to sell his lands at the price of \$1,000. There was no consideration for the offer, and it could have been nullified by L. at any time by withdrawal. But it was accepted by I., while outstanding, the price tendered, and deed demanded. It must be plain from the previous discussion that we do not hold that the offer, when made, or at any moment before acceptance, was a sale of lands, an agreement to sell lands, or an option. But upon acceptance and tender was not a contract completed? If one person offers to another to sell his property for a named price, and while the offer is unretracted the other accepts, tenders the money, and demands the property, that is a sale. The proposition is elementary. The property belongs to the vendee, and the money to the vendor. Such is precisely the situation of the parties herein. L. offered to sell for \$1,000. I. accepted, tendered the price, and demanded the property. Every element of a contract was present, parties, subject-matter, consideration, meeting of the minds, and mutuality. And as to the matter of mutuality we are now beyond the defective option. We have simply an offer at a price acceptance, payment or tender, and demand. That this was a valid contract we cannot for a moment doubt.

In discussing a transaction of this nature, in *Gordon v. Darnell*, 5 Colo. 304, Beck, C. J., in one of his clear opinions, says: "Its legal effect is that of a continuing offer to sell, which is capable of being converted into a valid contract by a tender of the purchase money, or performance of its conditions, whatever they may be, within the time stated, and before the seller withdraws the offer to sell." *Lutton J.*

in *Bradford v. Foster*, 87 Tenn. 8, 9 S. W. 195, says: "Before acceptance, such an agreement can be regarded only as an offer in writing to sell upon specified terms the lands referred to. Such an offer, if based upon no consideration, could be withdrawn by the seller at any time before acceptance. It is the acceptance while outstanding which gives an option, not given upon a consideration, vitality." In *Railroad Co. v. Bartlett*, 3 Cush. (Mass.) 227, we find the following, by Fletcher, J.: "In the present case, though the writing signed by the defendants was but an offer, and an offer that might be revoked, yet while it remained in force and unrevoked it was a continuing offer during the time limited for acceptance, and during the whole of that time it was an offer every instant; but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract."

This case readily distinguishes *Bean v. Burbank*, 16 Me. 458, 33 Am. Dec. 681, which may seem to hold a contrary doctrine. It also repudiates *Cooke v. Oxley*, 3 Term. R. 653, and claims that the English case is said to be inaccurately reported, and, in any event, entirely disregarded in the later decisions. * * *

The judgment of the district court is reversed, and the cause is remanded, with directions to that court to overrule the demurrer.

VI. Lapse of Offer *

MINNESOTA LINSEED OIL CO. v. COLLIER WHITE LEAD CO.

(United States Circuit Court, D. Minnesota, 1876. 4 Dill. 431,
17 Fed. Cas. No. 9,635.)

This action was removed from the state court and a trial by jury waived. The plaintiff seeks to recover the sum of \$2,151.50, with interest from September 20, 1875—a balance claimed to be due for oil sold to the defendant. The defendant, in its answer, alleges that on August 3d, 1875, a contract was entered into between the parties, whereby the plaintiff agreed to sell and deliver to the defendant, at the city of St. Louis, during the said month of August, twelve thousand four hundred and fifty (12,450) gallons of linseed oil for the price of fifty-eight (58) cents per gallon, and that the plaintiff has neglected and refused to deliver the oil according to the contract; that the market value of oil after August 3d and during the month was not less than seventy (70) cents per gallon, and therefore claims a set-off or counter-claim to plaintiff's cause of action. The reply of the plaintiff denies that any contract was entered into between it and defendant.

* For discussion of principles, see Clark on Contracts (2d Ed.) § 24.

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following dispatch to the defendant: "Minneapolis, July 29, 1875. To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri: Account of sales not enclosed in yours of 27th. Please wire us best offer for round lot named by you—one hundred barrels shipped. Minnesota Linseed Oil Company."

The following answer was received: "St. Louis, Mo., July 30, 1875. To the Minnesota Linseed Oil Company: Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer. Collier Company."

The following reply was returned: "Minneapolis, July 31, 1875. Will accept fifty-eight cents (58c), on terms named in your telegram. Minnesota Linseed Oil Company."

This dispatch was transmitted Saturday, July 31, 1875, at 9:15 p. m., and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between eight and nine o'clock.

On Tuesday, August 3, at 8:53 a. m., the following dispatch was deposited for transmission in the telegraph office: "St. Louis, Mo., August 3, 1875. To Minnesota Linseed Oil Company, Minneapolis: Offer accepted—ship three hundred barrels as soon as possible. Collier Company."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis: "Minneapolis, August 3, 1875. To Collier Company, St. Louis: We must withdraw our offer wired July 31st. Minnesota Linseed Oil Company."

Answered: "St. Louis, August 3, 1875. Minnesota Linseed Oil Company: Sale effected before your request to withdraw was received. When will you ship? Collier Company."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon. It is urged by the defendant that the dispatch of Tuesday, August 3d, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil. The plaintiff, on the contrary, claims, 1st, that the dispatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

NELSON, District Judge. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract

is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. See 14 Am. Law Reg. 401, "Contracts by 'Telegraph,'" article by Judge Redfield, and authorities cited; also, *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511.

The reason for this rule is well stated in *Adams v. Lindsell*, 1 Barn. & Ald. 681. The negotiation in that case was by post. The court said: "That if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on *ad infinitum*." See, also, *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. 339; *Vassar v. Camp*, 11 N. Y. 441; *Mactier v. Frith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *Abbott v. Shepard*, 48 N. H. 14; 8 C. B. 225. In the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock, on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Pars. Cont. 482, 483.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or by telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (volume 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. * * * If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. ~~The delay~~ here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied. Judgment accordingly.

VII. Offers to the Public Generally ¹⁰

BROADNAX v. LEDBETTER.

(Supreme Court of Texas, 1907. 100 Tex. 375, 99 S. W. 1111,
9 L. R. A. [N. S.] 1057.)

Action by S. H. Broadnax against A. L. Ledbetter. Judgment for defendant, and plaintiff appeals. Questions certified by the Court of Civil Appeals to the Supreme Court.

WILLIAMS, J. This case is sent up by the Court of Civil Appeals for the third district upon the following certificate:

"The Court of Civil Appeals of the Third Supreme Judicial District of the state of Texas certifies that the above-styled and numbered cause is now pending on appeal in this court, and states that the cause of action asserted by the appellant against appellee is set out in plaintiff's original petition, which is as follows:

"'State of Texas, County of Dallas. In the County Court of Dallas County, Texas. To the Honorable Judge of Said Court: Your petitioner, S. H. Broadnax, who is a resident citizen of Dallas County, Tex., hereinafter called "plaintiff," complaining of A. L. Ledbetter, who resides in Dallas county, Texas, hereinafter called "defendant,"

¹⁰ For discussion of principles, see **Clark on Contracts** (2d Ed.) § 25.

respectfully shows to the court: That defendant is now and was on the dates hereinafter mentioned the duly elected, qualified, and acting sheriff of Dallas county, Tex., that heretofore, to wit, on or about the 21st day of December, 1904, one Holly Vann was, in the criminal district court of Dallas county, Tex., duly convicted of murder in the first degree, and his punishment assessed at death; that from the date of conviction, as aforesaid, until the 25th day of January, 1905, said Vann was a prisoner in the custody of said defendant, as sheriff of Dallas county, Tex., and was confined in the county jail of said county; that on said last-named date, and pending the appeal of said case of said Vann to the Court of Criminal Appeals of the state of Texas, he, the said Vann, by some method and means unknown to plaintiff, effected his escape from said jail, and from the custody of said defendant, and remained at large, a fugitive from justice, until the evening of the 25th day of January, 1905; that after the escape of the said prisoner, Vann, and during the time he was at large, a fugitive from justice, said defendant did make, and cause to be made, publish, and cause to be published, circulate, and cause to be circulated, an offer, to the effect that he, the said defendant, would pay as a reward the sum of \$500 to any party or parties who would recapture the said prisoner, Vann, and return him to the Dallas county jail, from which he escaped, or to any other jail or jailer in the state of Texas; that said offer to pay such reward was made to the public generally—that is, to any person or persons who would capture the said prisoner and return him to custody, as aforesaid, and was not made to any special person or officer—that subsequent to the making, publishing, and circulating of said offer to pay such reward, and in conformity therewith and before the revocation thereof, said plaintiff did on, to wit, the 25th day of January, 1905, recapture, restrain, hold, and return the said prisoner, Vann, for whose capture said reward was offered, to the custody of said defendant, and to the county jail of Dallas county, Tex., and there delivered said prisoner to the custody of said defendant, and performed all the conditions contained in said offer to pay such reward; that by reason of the premises and the full performance by plaintiff of the services for which said reward was offered said plaintiff is entitled to said reward, and said defendant became liable to plaintiff, and promised to pay plaintiff the full amount thereof, to wit, \$500; that, though often requested, defendant has failed and refused, and still fails and refuses, to pay the same or any part thereof, to plaintiff's damage in the sum of \$500. Wherefore your petitioner prays for citation hereon, as required by law, and upon final hearing for judgment for the sum of \$500 and for cost of suit, and for general and special relief.

"In the trial court the appellee interposed demurrers on the ground that the petition stated no cause of action, because it was not alleged that the plaintiff had knowledge or notice of the reward when the escaped prisoner was captured and returned to jail by the plaintiff.

These demurrers were by the court sustained, and, plaintiff declining to amend, judgment was entered dismissing plaintiff's case, with a judgment against him for all costs, etc. In view of the above statement, we propound the following question: Was notice or knowledge to plaintiff of the existence of the reward when the recapture was made essential to his right to recover?"

Upon the question stated there is a conflict among the authorities in other states. All that have been cited or found by us have received due consideration, and our conclusion is that those holding the affirmative are correct. The liability for a reward of this kind must be created, if at all, by contract. There is no rule of law which imposes it except that which enforces contracts voluntarily entered into. A mere offer or promise to pay does not give rise to a contract. That requires the assent or meeting of two minds, and therefore is not complete until the offer is accepted. Such an offer as that alleged may be accepted by any one who performs the service called for when the acceptor knows that it has been made and acts in performance of it, but not otherwise. He may do such things as are specified in the offer, but, in so doing, does not act in performance of it, and therefore does not accept it, when he is ignorant of its having been made. There is no such mutual agreement of minds as is essential to a contract. The offer is made to any one who will accept it by performing the specified acts, and it only becomes binding when another mind has embraced and accepted it. The mere doing of the specified things without reference to the offer is not the consideration for which it calls. This is the theory of the authorities which we regard as sound. Pollock on Contracts, 20; Anson on Contracts, 41; Wharton on Contracts, §§ 24, 507; Story on Contracts (5th Ed.) 493; Page on Contracts, § 32; 9 Cyc. Law & Proc. 254; 29 Am. & Eng. Ency. Law, 956. The decisions of the courts upon the question are cited by the authors referred to.

Some of the authorities taking the opposite view seem to think that the principles of contracts do not control the question, and in one of them, at least, it is said that "the sum offered is but a boon, gratuity, or bounty, generally offered in a spirit of liberality, and not as a mere price, or a just equivalent simply for the favor or service requested, to be agreed or assented to by the person performing it, but, when performed by him, as justly and legally entitling him to a fulfillment of the promise, without any regard whatever to the motive or inducement which prompted him to perform it." *Eagle v. Smith*, 4 Houst. (Del.) 293. But the law does not force persons to bestow boons, gratuities, or bounties merely because they have promised to do so. They must be legally bound before that can be done. It may be true that the motive of the performer in rendering service is not of controlling effect, as is said in some of the authorities above cited in pointing out the misapprehension of the case of *Williams v. Cardwaine*, 6 English Ruling Cases, 133, into which some of the courts

have fallen. But this does not reach the question whether or not a contractual obligation is essential.

Other authorities say that it is immaterial to the offerer that the person doing that which the offer calls for did not know of its existence; that the services are as valuable to him when rendered without as when rendered with knowledge. *Dawkins v. Sappington*, 26 Ind. 199; *Auditor v. Ballard*, 9 Bush (Ky.) 572, 15 Am. Rep. 728. But the value to the offerer of the acts done by the other party is not the test. They may in supposable cases be of no value to him, or may be no more valuable to him than to the person doing them. He is responsible, if at all, because, by his promise, he has induced another to do the specified things. Unless so induced, the other is in no worse position than if no reward had been offered. The acting upon this inducement is what supplies, at once, the mutual assent and the contemplated consideration. Without the legal obligation thus arising from contract there is nothing which the law enforces.

Reasons have also been put forward of a supposed public policy, assuming that persons will be stimulated by the enforcement of offers of rewards in such cases to aid in the detection of crime and the arrest and punishment of criminals. But, aside from the fact that the principles of law to be laid down cannot on any sound system of reasoning be restricted to offers made for such purposes, it is difficult to see how the activities of people can be excited by offers of rewards of which they know nothing. If this reason had foundation in fact, it would hardly justify the courts in requiring private citizens to minister to the supposed public policy by paying rewards merely because they have made offers to pay upon which no one has acted.⁹ Courts can only enforce liabilities which have in some way been fixed by the law. While we have been seen no such distinction suggested, it may well be supposed that a person might become legally entitled to a reward for arresting a criminal, although he knew nothing of its having been offered, where it is or was offered in accordance with law by the government. A legal right might in such a case be given by law without the aid of contract. But the liability of the individual citizen must arise from a contract binding him to pay.

The question is answered in the affirmative. ¹

VIII. Offer as Referring to Legal Relations¹¹

CHEROKEE TANNING EXTRACT CO. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina, 1906. 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806.)

Action by the Cherokee Tanning Extract Company against the Western Union Telegraph Company.

This is an appeal from a judgment in favor of the plaintiff, for damages alleged to have been sustained through the negligence of the defendant in failing to transmit and deliver promptly a certain telegram.

BROWN, J. There is no dispute as to the material facts. The evidence shows:

That on the 7th day of November, 1903, an agent of the Standard Oil Company at Wilmington, N. C., wrote to the plaintiff at Andrews, N. C., a letter containing among other things, this request: "Kindly advise us by wire Monday if you can use about 1,500 creosote barrels between now and January 1st at 95 cents each delivered in car load lots." That the plaintiff received this letter on Monday, November 9th, and at 7:30 p. m. of that day and filed with the defendant, at its Andrews office, a message addressed to the Standard Oil Company, Wilmington, N. C., and reading as follows: "We accept your offer 1,500 barrels as per yours of the 7th." This message was delivered to the sendee at 10:36 a. m., November 10th. At the same time it wrote to plaintiff, the oil company addressed a similar letter to the Brevard Tanning Company and others. The latter company purchased the barrels by telegram received by the oil company shortly before plaintiff's message.

The plaintiff claims substantial damage. Defendant requested the court to charge that plaintiff was entitled to recover nominal damages only, to wit, the price paid for the telegram. We think this instruction should have been given.

Damages are measured in matters of contract not only by the well-known rule laid down in *Hadley v. Baxendale*, 9 Ench. 341, but they must not be the remote, but the proximate, consequence of a breach of contract, and must not be speculative or contingent. Unless the reply of plaintiff by wire to the letter of the oil company created a contract between the two for the sale and delivery of 1,500 barrels at 95 cents each, then plaintiff can recover only nominal damages for any other damages would necessarily be purely speculative or con-

¹¹ For discussion of principles, see Clark on Contracts (2d Ed.) § 26.

tingent. The language of Brannon, J., in a similar case in West Virginia is appropriate to this: "But the trouble facing the plaintiff in this case is that there was no final contract between the parties, but only a proposal for a contract, and there can be no contract without both a proposal and its acceptance. The failure of the telegram company did not cause the breach of a consummate contract; it only prevented one that might or might not have been made." *Beatty v. Tel. Co.*, 52 W. Va. 410, 44 S. E. 309. See, also, *Hosiery Co. v. Tel. Co.*, 123 Ga. 216, 51 S. E. 290, and *Wilson v. Tel. Co.*, 124 Ga. 131, 52 S. E. 153. The offer must be distinct as such, and not merely an invitation to enter into negotiations upon a certain basis. *Wire Works v. Sorrell*, 142 Mass. 442, 8 N. E. 332; *Beaupre v. Tel. Co.*, 21 Minn. 155; 24 Am. & Eng. Enc. 1029, and cases cited.

Again, the offer must specify the specific quantity to be furnished, as a mere acceptance of an indefinite offer will not create a binding contract. *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 664; 24 Am. & Eng. Enc. 1030, note 1, and cases cited. "The offer must be one which is intended of itself to create legal relations or acceptance. It must not be an offer merely to open negotiations which will ultimately result in a contract." 1 Paige on Cont. § 26, and cases cited; *Clark on Contracts*, § 29.

In *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516, the defendants wrote to the plaintiff as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt in full car load lots of 80 to 75 barrels, delivered at your city at 85 cents per barrel to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain as the price in general remains unchanged. Shall be pleased to receive your order." The plaintiff at once telegraphed the defendant: "Your letter of yesterday received and noted. You may ship me two thousand barrels Michigan fine salt as offered in your letter." The defendant declined to deliver the salt and plaintiff sued for damages. The Supreme Court of Wisconsin, sustaining a demurrer to the complaint, held that the communications between the parties did not show a contract; that the letter of the defendants was not such an offer as plaintiff could by an acceptance change into a binding agreement. See, also, *Smith v. Gowdy*, 8 Allen (Mass.) 566.

The letter from the oil company to the plaintiff was a mere inquiry. *Walser v. Tel. Co.*, 114 N. C. 440, 19 S. E. 366. It was evidently a "trade inquiry" sent out by the oil company to customers, and did not purport and was not intended to be a legal offer binding on acceptance. "Care should be taken always not to construe as an agreement letters which the parties intended only as preliminary negotiations." *Lyman v. Robinson*, 14 Allen (Mass.) 254.

Again, the acceptance by the plaintiff was not in the terms of the offer. The acceptance was for 1,500 barrels. The oil company could not have compelled the plaintiff to take a less number. If the plain-

tiff regarded the oil company's letter as a valid offer, it should have replied that it would take what barrels the oil company had, not exceeding 1,500, as that company had offered no exact specific number. "An acceptance to bind the other party must be unconditional and unqualified and must correspond exactly to the terms of the offer." 24 Am. & Eng. Enc. 1031, 1032, and cases cited; 1 Parsons, Cont. 476, 477.

As the plaintiff's message to the oil company seasonably delivered would not, of itself, have effected a legal contract between the plaintiff and the oil company for the delivery of 1,500 barrels at 95 cents each, it follows that any other than nominal damage would be purely speculative. The oil company might have delivered the barrels, and then, again, it might not have done so. It might have delivered 1,500, and again it might have delivered a much less number. Its letter specified no exact number and it was under no legal compulsion to deliver any.

As the defendant manifests its willingness to pay nominal damages, it is unnecessary to consider the exceptions to his honor's rulings on the issue of negligence.

We award a new trial upon the second issue relating to the damages. Partial new trial.

THROCKM. CONT.—3

CLASSIFICATION OF CONTRACTS—CONTRACTS UNDER SEAL AND CONTRACTS OF RECORD

I. Classification of Contracts¹

RANN et al. v. HUGHES.

(House of Lords, 1778. 7 Term R. 350, note, 4 Br. P. C. 27, 2 Eng. Repr. 18. 53 Rev. Rep. 262, 6 Eng. R. C. 1.)

The declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiffs' testator £983. That the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of £983 was unpaid, "by reason of which premises the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable she in consideration thereof undertook and promised to pay &c."^a The defendant pleaded non assumpsit; plené administravit; and plené administravit, except as to certain goods &c. which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth &c.^b The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant de bonis propriis.

This judgment was reversed in the exchequer-chamber; and a writ of error was afterwards brought in the house of lords, where after argument the following question was proposed to the judges by the lord chancellor, "Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her personal capacity;" upon which the Lord Chief Baron Skynner delivered the opinion of the judges to this effect: "It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is nudum pactum ex quo non oritur actio, and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration

¹ For discussion of principles, see Clark on Contracts (2d Ed.) § 27.

states that the defendant being indebted as administratrix promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be coextensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing that takes away the necessity of a consideration and obviates the objection of nudum pactum, for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing; and this last is certainly true; but that there cannot be nudum pactum in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His lordship observed upon the doctrine of nudum pactum delivered by Mr. J. Wilmot in the case of *Pillans v. Van Mierop and Hopkins*, 3 Burrows, 1663, that he contradicted himself, and was also contradicted by Vinnius in his Comment on Justinian.

All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the statute of frauds has taken away the necessity of any consideration in this case; the statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition that when in writing the party must be at all events liable. He here observed upon the case of *Pillans v. Van Mierop* in Burrows, and the case of *Losh v. Williamson*, Mich. 16 Geo. III. in B. R.; and so far as these cases

went on the doctrine of nudum pactum, he seemed to intimate that they were erroneous. He said that all his Brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the exchequer-chamber was affirmed.

II. Contracts of Record ²

O'BRIEN v. YOUNG.

(Court of Appeals of New York, 1884. 95 N. Y. 428, 47 Am. Rep. 64.)

Appeal from an order of the General Term of the Supreme Court, first department, made January 8, 1884, affirming an order of the Special Term made November 23, 1883, which denied a motion by defendants to restrain plaintiff, the sheriff of New York county, from collecting interest upon a judgment in favor of plaintiff and against the defendants at a rate greater than 6 per cent. from and after January 1, 1880.

The judgment in question was recovered February 10, 1877, and on November 19, 1883, an execution thereon was issued to the sheriff of New York county, directing him to collect the amount of the judgment, \$2,994.64, with interest at 7 per cent. from February 10, 1877.

EARL, J.³ By the decided weight of authority in this state, where one contracts to pay a principal sum at a certain future time with interest, the interest prior to the maturity of the contract is payable by virtue of the contract, and thereafter as damages for the breach of the contract. *Macomber v. Dunham*, 8 Wend. 550; *United States Bank v. Chapin*, 9 Wend. 471; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 N. Y. 586; *Railroad Co. v. Moravia*, 51 Barb. 180. And such is the rule as laid down by the federal supreme court. *Brewster v. Wakefield*, 22 How. 118, 16 L. Ed. 301; *Bernhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766; *Holden v. Trust Co.*, 100 U. S. 72, 25 L. Ed. 567. The same authorities show that after the maturity of such a contract, the interest is to be computed as damages according to the rate prescribed by the law, and not according to that prescribed in the contract if that be more or less.

² For discussion of principles, see Clark on Contracts (2d Ed.) § 28.

³ The statement of facts is abridged and the concurring opinion of Andrews, J., and the dissenting opinion of Danforth, J., are omitted.

But when the contract provides that the interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until payment of the principal, or until the contract is merged in a judgment. And where one contracts to pay money on demand "with interest," or to pay money generally "with interest," without specifying time of payment, the statutory rate then existing becomes the contract rate and must govern until payment, or at least until demand and actual default, as the parties must have so intended. *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21; *Eaton v. Boissonnault*, 67 Me. 540, 24 Am. Rep. 52.

If, therefore, this judgment, the amount of which is by its terms payable with interest, is to be treated as a contract—as a bond executed by the defendants at its date, then the statutory rate of interest existing at the date of the rendition of the judgment is to be treated as part of the contract and must be paid by the defendants according to the terms of the contract, and thus the plaintiff's contention is well founded.

But is a judgment, properly speaking, for the purposes now in hand, a contract? I think not. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented. All the authorities assert that the existence of parties legally capable of contracting is essential to every contract, and yet they nearly all agree that judgments entered against lunatics and others incapable in law of contracting are conclusively binding until vacated or reversed. In *Wyman v. Mitchell*, 1 Cow. 316, Sutherland, J., said that "a judgment is in no sense a contract or agreement between the parties." In *McCoun v. Railroad Co.*, 50 N. Y. 176, Allen, J., said that "a statute liability wants all the elements of a contract, consideration and mutuality as well as the assent of the party. Even a judgment founded upon contract is no contract."

In *Bidleson v. Whytel*, 3 Burrows, 1545-1548, it was held after great deliberation and after consultation with all the judges, Lord Mansfield speaking for the court, "that a judgment is no contract, nor can be considered in the light of a contract, for *judicium redditur in invitum*." To the same effect are the following authorities: *Rae v. Hulbert*, 17 Ill. 572; *Todd v. Crumb*, 5 McLean, 172, Fed. Cas. No. 14,073; *Smith v. Harrison*, 33 Ala. 706; *Masterson v. Gibson*, 56 Ala. 56; *Keith v. Estill*, 9 Port. (Ala.) 669; *Larrabee v. Baldwin*, 35 Cal. 156; *In re Kennedy*, 2 S. C. 226; *State v. Mayor, etc., of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936.

But in some decided cases, and in text-books, judges and jurists have frequently, and, as I think, without strict accuracy, spoken of judgments as contracts. They have been classified as contracts with reference to the remedies upon them. In the division of actions into actions *ex contractu* and *ex delicto*, actions upon judgments have been assigned to the former class. It has been said that the law of contracts, in its widest extent, may be regarded as including nearly all the

law which regulates the relations of human life; that contract is co-ordinate and commensurate with duty; that whatever it is the duty of one to do he may be deemed in law to have contracted to do, and that the law presumes that every man undertakes to perform what reason and justice dictate he should perform. 1 Pars. Cont. (6th Ed.) 3; 2 Bl. Comm. 543; 3 Bl. Comm. 160; *McCoun v. Railroad Co.*, supra.

Contracts in this wide sense are said to spring from the relations of men to each other and to the society of which they are members. Blackstone says: "It is a part of the original contract entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state of which each individual is a member." In the wide sense thus spoken of the contracts are mere fictions invented mainly for the purpose of giving and regulating remedies. A man ought to pay for services which he accepts, and hence the law implies a promise that he will pay for them. A man ought to support his helpless children, and hence the law implies a promise that he will do so. So one ought to pay a judgment rendered against him, or a penalty which he has by his misconduct incurred, and hence the law implies a promise that he will pay. There is no more contract to pay the judgment than there is to pay the penalty. He has neither promised to pay the one nor the other. The promise is a mere fiction, and is implied merely for the purpose of the remedy. Judgments and penalties are, in the books, in some respects, placed upon the same footing. At common law both could be sued for in an action *ex contractu* for debt, the action being based upon the implied promise to pay. But no one will contend that a penalty is a contract, or that one is really under a contract liability to pay it. *McCoun v. N. Y. C. & H. R. R. Co.*, supra.

Suppose a statute gives a penalty to an aggrieved party, with interest, what interest could he recover? The interest allowed by law when the penalty accrued, if the statute rate has since been altered? Clearly not. He would be entitled to the interest prescribed by law during the time of the defendant's default in payment. There would, in such a case, be no contract to pay interest, and the statutory rate of interest at the time the penalty accrued would become part of no contract. If, therefore, a subsequent law should change the rate of interest, no vested right would be interfered with, and no contract obligation would be impaired.

The same principles apply to all implied contracts. When one makes a valid agreement to pay interest at any stipulated rate for any time, he is bound to pay it, and no legislative enactment can release him from his obligation. But in all cases where the obligation to pay interest is one merely implied by the law or is imposed by law, and there is no contract to pay except the fictitious one which the law implies, then the rate of interest must at all times be the statutory rate. The rate existing at the time the obligation accrued did not become part of any contract, and hence the law which created the obliga-

tion could change or alter it for the future without taking away a vested right or impairing a contract.

In the case of all matured contracts which contain no provision for interest after they are past due, as I have before said, interest is allowed, not by virtue of the contract, but as damages for the breach thereof. In such cases what would be the effect of a statute declaring that no interest should be recovered? As to the interest which had accrued as damages before the date of the law, the law could have no effect because that had become a vested right of property which could not be taken away. But the law could have effect as to the subsequent interest, and in stopping that from running would impair no contract. A law could be passed providing that in all cases of unliquidated claims which now draw no interest, interest should thereafter be allowed as damages; and thus there is ample legislative power in such cases to regulate the future rate of interest without invading any constitutional right. When a man's obligation to pay interest is simply that which the law implies, he discharges that obligation by paying what the law exacts.

This judgment, so far as pertains to the question we are now considering, can have no other or greater force than if a valid statute had been enacted requiring the defendant to pay the same sum with interest. Under such a statute, interest would be computed, not at the rate in force when the statute was enacted, but according to the rate in force during the time of default in payment. A different rule would apply if a judgment or statute should require the payment of a given sum with interest at a specified rate. Then interest at the rate specified would form part of the obligation to be discharged.

Here, then, the defendant did not in fact contract or promise to pay this judgment, or the interest thereon. The law made it his duty to pay the interest, and implied a promise that he would pay it. That duty is discharged by paying such interest as the law, during the time of default in paying the principal sum, prescribed as the legal rate.

If this judgment had been rendered at the date the execution was issued, interest would have been computed upon the original demand at seven per cent. to January 1, 1880, and then at the rate of 6 per cent. Shall the plaintiff have a better position because the judgment was rendered prior to 1880?

As no intention can be imputed to the parties in reference to the clause in the judgment requiring payment "with interest" we may inquire what intention the court had. It is plain that it could have had no other intention than that the judgment should draw the statutory interest until payment. It cannot be presumed that the court intended that the interest should be at the rate of 7 per cent. if the statutory rate should become less.

That there is no contract obligation to pay the interest upon judgments which is beyond legislative interference is shown by legislation in this country and in England. Laws have been passed providing

that all judgments should draw interest, and changing the rate of interest upon judgments, and such laws have been applied to judgments existing at their date, and yet it was never supposed that such laws impaired the obligation of contracts.

It is claimed that the provision in section 1 of the act of 1879, which reduced the rate of interest (chapter 538), saves this judgment from the operation of that act. The provision is that "nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act." The answer to this claim is that here there was no contract to pay interest at any given rate. The implied contract, as I have shown, was to pay such interest as the law prescribed, and that contract is not affected or interfered with.

The foregoing was written as my opinion in the case of *Prouty v. Railway Co.*, 95 N. Y. 667. The only difference between that case and this is that there the judgment was by its terms payable "with interest." Here the judgment contains no direction as to interest. The reasoning of the opinion is applicable to this case and is, therefore, read to justify my vote in this. Since writing the opinion, we have decided in the case of *Sanders v. Railway Co.*, 94 N. Y. 641, the law to be as laid down in the first paragraph of the opinion.

The orders of the general and special terms should be reversed and the motion granted, without costs in either court, the parties having so stipulated.

III. Contracts Under Seal *

1. HOW CONTRACTS UNDER SEAL ARE MADE

'Appeal of HACKER.

(Supreme Court of Pennsylvania, 1888. 121 Pa. 192, 15 Atl. 500,
1 L. R. A. 861.)

Appeal from orphans' court, Philadelphia county.

Decree in the orphans' court relative to the estate of Ellen Waln, deceased, construing the holographic will of said decedent not to be an exercise of a power of appointment under the will of Jacob S. Waln. William Hacker, executor of the will of Ellen Waln, appeals.

CLARK, J. The only question to be decided in this case is whether or not Ellen Waln properly exercised the power of appointment given her in the last will and testament of her father, Jacob S. Waln, deceased. The testator, Jacob S. Waln, devised and bequeathed all of

* For discussion of principles, see Clark on Contracts (2d Ed.) §§ 30-33.

his property, real, personal, and mixed, to certain persons named in his will, upon certain trusts, viz.: To pay the net income thereof to his wife, Sarah M. Waln, during the term of her life; at her death to apportion the trust-estate into as many shares as he had children, and to convey to his sons, Henry and Edward, their respective shares in fee; to pay to each of his daughters, whether covert or single, the income of their respective shares for their maintenance and support; or, in case of their marriage and death, to their surviving husbands or children, respectively, as the case might be; "and to convey the share of any unmarried daughter, or of a daughter dying married and without children, as she may by writing under her hand and seal, in nature of a last will and testament, executed in the presence of two witnesses, designate and appoint; and, in default of such appointment, to their or her brothers or sisters living, or, if dead leaving issue, then to the said issue, share and share alike." Ellen Waln, one of the daughters who was unmarried and without issue, made and published her last will and testament, wherein she undertook to exercise the power of appointment reposed in her by her father's will; referring specially to the property covered by the trust, and over which she was invested with the power. Her will is in due form, was signed by her in the presence of two witnesses, was after her death duly probated and recorded, and it is conceded to be a perfectly valid disposition of her estate.

It is contended, however, that the will is not a valid exercise of the power, because it is not in compliance with the donor's directions, in this: that it is not a writing under seal. The testimonium clause of the will is in these words: "In witness whereof I have hereunto set my hand and seal;" and to this is appended the signature in the form following: "Ellen Waln—." No wafer or scroll in the usual form was affixed for a seal, nor was there any flourish of the pen in lieu thereof, other than the dash "—" following the name, which was perhaps from one-sixteenth to one-eighth of an inch in length, and was made by the pen, apparently in connection with the signature. The estate of Ellen Waln was for life only. The fee, under this peculiar provision of her father's will, was vested in those entitled in default of appointment, subject to be divested, however, on a proper execution of the power. It may be conceded, too, that it was essential that the exercise of the power should be in strict compliance with the directions contained in the will of Jacob S. Waln, deceased. He was the owner of the entire estate, and had a right to dispose of it as he pleased. Therefore any terms which he saw fit to impose must be fulfilled, or the execution is fatally defective. *Rutland v. Wythe*, 10 Clark & F. 419.

The world has outgrown the necessities of an age when men made their seals because they could not write. What then from necessity attested the very act of execution and the genuineness of it is now but a mere arbitrary form, through which, however, special obligations

still attach, in support of the well-recognized distinction between writings which are sealed and those that are not. "Although in this and many of our sister states," says Chief Justice Tilghman in *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502, "the law has been somewhat relaxed in favor of custom and convenience in doing business, yet this relaxation is confined to the manner of making a seal. Sealing and delivering are still the criterion of a specialty; and it is important that the distinction between specialties and writings should be preserved in the courts, because in payment of debts due from the estates of deceased persons and in other cases the law makes the distinction. If it should be thought that in the present state of society it would be best to put all writings on the same footing, the legislature alone has power to accomplish it." That the writing should be "under seal," it may be conceded, was in this instance a mere technical requirement, which could not in any way affect the substance of the instrument, or add to or subtract from the testator's rights; yet it was competent for him, as against a mere volunteer or a charity, to impose any lawful restriction upon the execution of the power which his judgment would approve or his fancy suggest.

Was the will of Ellen Waln under seal? This is the question upon which the determination of this case depends. It is plain that in the preparation of her last will the testatrix intended to exercise this power of appointment, and to exercise it in the way designated by the donor. She made particular reference to the property over which she had the power, and in proper form and phrase disposed of it, designating and appointing the persons to receive it. She subscribed her name with the mark following, in the presence of two witnesses; and in the testimonium clause states, in terms, that she has affixed her hand and seal. Under such special circumstances, may we not assume that the testatrix intended this dash of the pen as a seal? A seal is not necessarily of any particular form or figure. When not of wax, it is usually made in the form of a scroll; but the letters "L. S." or the word "Seal," inclosed in brackets or in some other design, is in frequent use. It may, however, consist of the outline, without any inclosure. It may have a dark ground or a light one. It may be in the form of a circle, an ellipse, or a scroll, or it may be irregular in form. It may be a simple dash or flourish of the pen. *Long v. Ramsay*, 1 Serg. & R. (Pa.) 72. Its precise form cannot be defined; that, in each case, will depend wholly upon the taste or fancy of the person who makes it. The mere fact that in the testimonium clause the testatrix states that she has affixed her hand and seal is insufficient to constitute the instrument a writing under seal if, in fact, there be no seal; but if there be any mark or impression which might reasonably be taken for a seal, this statement of the testatrix will certainly afford the strongest evidence that the mark was so intended.

In *Taylor v. Glaser*, supra, there was nothing but a flourish of the pen below the signature, and it was offered to be shown that this ac-

accompanied Glaser's ordinary signature. There was nothing on the face of the paper which, in the opinion of the court, the obligor could have intended for a seal. To the same effect is the case of *Duncan v. Duncan*, 1 Watts (Pa.) 322, where a ribbon had been inserted, manifestly as a preliminary to the act of sealing, which act was never performed. Whether the instrument is under seal or not is a question to be determined by the court upon inspection; and whether or not any mark or impression shall be held to be a seal depends wholly upon the intention of the party executing the instrument as exhibited on the face of the paper itself. The dash which follows the signature in this case, it must be conceded, is not in the usual or ordinary form of a seal; but, as no particular form is prescribed by law, we think that upon a consideration of the plain requirements of the writing creating the power, and of the manifest purpose and effort of the testatrix to execute that power in the manner designated, and her avowed purpose to affix a seal, together with the presence of a mark or flourish of the pen which may be taken as such, we are justified in assuming that the mark was made and intended for a seal, and that the writing is in this respect in compliance with the donor's directions. It is said that the same or a similar mark is found in other parts of the will, used for punctuation, and that this is a circumstance evidencing a different intention of the testatrix. But if the testatrix did use a mark in this form indifferently for a comma, a colon, or a period, what good reason is there for supposing she did not also use it for a seal?

The decree of the orphans' court is reversed, and the record remitted, in order that a decree may be made in accordance with this opinion.

2. CHARACTERISTICS OF CONTRACT UNDER SEAL

WATKINS v. ROBERTSON et al.

(Supreme Court of Appeals of Virginia, 1906. 105 Va. 269, 54 S. E. 33, 5 L. R. A. [N. S.] 1194, 115 Am. St. Rep. 880.)

Appeal from Chancery Court of Richmond.

Suit by Charles H. Watkins against W. S. Robertson and others for specific performance of a contract for sale of corporate stock. From a decree in favor of defendants, complainant appeals.

CARDWELL, J.⁶ This litigation grows out of the following agreement:

"Memorandum of agreement, made this 26th day of October, 1904, by and between W. S. Robertson, of the first part, and S. S. Elam, of the second part.

⁶ A portion of the opinion is omitted.

"The said W. S. Robertson, party of the first part, in consideration of one dollar to them in hand paid by said S. S. Elam, party of the second part, at and before the execution of this contract, the receipt of which is hereby acknowledged, do hereby covenant, contract and agree to sell to the said S. S. Elam, party of the second part, or his assigns 496 shares of the capital stock of the Watkins-Cottrell Company, at and for the price of \$137.50 per share, and to deliver the same to said second party on payment, or tender by said second party to said first party of the purchase money therefor at the said rate of \$137.50 per share; and it is agreed between the parties hereto that the said party of the second part shall have the right to make the said tender or payment of the said purchase money to said first party and thereupon to demand the delivery of the said capital stock until December 1, 1904.

"Witness our hands and seals the day and year first above written.

"W. S. Robertson. [Seal.]

"S. S. Elam. [Seal.]"

On the 21st of November, 1904, Elam in writing and for value received assigned the above "option and agreement" to Oliver J. Sands, or his assigns, and on the same day and in the same words Sands made a similar assignment of the agreement to Charles H. Watkins, or his assigns.

On the same date of the agreement, Robertson executed and delivered to Elam the following paper:

"Oct. 26, 1904.

"Mr. S. S. Elam, Richmond, Va.

"Dear Sir: Referring to the option given you to-day on my 496 shares of stock in the Watkins-Cottrell Company, at \$137.50 per share, until Dec. 1, 1904, I beg to advise that if the said option is exercised by you or your assigns I will allow you a rebate of \$3,180.-38 on the price named in said option.

"Yours very truly,

W. S. Robertson."

This latter agreement was by Elam, on the 21st of November, 1904, for value received, also assigned to Oliver J. Sands, or his assigns.

The plaintiff, Charles H. Watkins, filed his original and amended bills in this cause for the purpose of enforcing the specific performance of the contract of October 26, 1904, for the sale of the 496 shares of stock referred to therein, he claiming to have purchased the stock through Oliver J. Sands, on November 21, 1904, in accordance with the terms and provisions of the contract; that on the day and year last mentioned the said Sands did in fact purchase said option contract from Elam, paying him therefor the sum of \$3,180.38, and took an assignment thereof from him; that Sands, acting in the matter for the plaintiff, approached the defendant, W. S. Robertson, on the day and year last stated and notified Robertson that he (Sands) desired to exercise said option contract by the purchase of the 496 shares of stock at the price named in the contract, to wit: \$137.50

per share, and then and there offered to pay Robertson the full purchase price thereof, but Robertson refused to receive the same, stating that he had already sold the stock to another party; that upon this refusal of Robertson, Sands assigned said option contract to the plaintiff, of which assignment Robertson was at once notified; and that Robertson was also then notified that the plaintiff was ready, able and willing to pay for the stock the full price agreed upon in the option contract, and warned to make no assignment or transfer of the stock to other than the plaintiff. An injunction was prayed for and granted, restraining Robertson, his agents, etc., from selling, assigning, or delivering the said shares of stock of the Watkins-Cottrell Company in the bill mentioned, or any part thereof, or in any way parting from the possession of the stock, or the certificates representing the same, until the further order of the court. * * *

Upon the pleadings in the cause, the exhibits therewith and an affidavit made and filed by Robertson, the lower court, by its decree, reciting that the case would be rendered doubtful by the conflicting evidence of the parties, and by the consent of both plaintiff and defendant, and in pursuance of the statute in such case made and provided, adjudged, ordered, and decreed that an issue be made up and tried by a jury at the bar of the court on the 23d day of February, 1905, to ascertain whether the alleged purchase of the 496 shares of the capital stock of the Watkins-Cottrell Company, as claimed in the bills of complaint to have been made by the plaintiff, Charles H. Watkins, was and is valid and binding upon the defendant, W. S. Robertson.

Upon the trial of this issue, it was found by the jury that the alleged purchase of the 496 shares of stock in question, as claimed in the bills of complaint to have been made by the plaintiff Watkins, was not binding upon the defendant Robertson. Upon the coming in of this verdict, the plaintiff moved the court to set it aside because contrary to the law and the evidence, and again moved the court for leave to file an amended and supplemental bill. The court by its decree of March 11, 1905, overruled the motion for leave to plaintiff to file an amended and supplemental bill, because the pleadings already filed sufficiently raised all the questions proposed to be raised by the amended and supplemental bill, and all such questions were presented to the court in the instructions asked for by the complainant on the trial of the issue, and were then, after argument, decided against the complainant; and also overruled plaintiff's motion to set aside the verdict of the jury, and dissolved the injunction theretofore awarded in the cause. From this decree the case is before us for review upon an appeal allowed to the plaintiff in the court below. * * *

As claimed by counsel for appellant, the court by instructions A, B, and C, practically took the case from the jury and left them no room to bring in a verdict other than they did. A told the jury that the papers introduced in evidence (that is, the contract and the letter

from Robertson to Elam appended thereto) together constitute an option, and that said option was a unilateral or one-sided contract: that is, it set forth certain obligations assumed by the defendant, Robertson, but contained none assumed by or binding upon Elam. C made the verdict depend in part upon the disputed questions of fact, whether Robertson subsequently sold the stock to Stuart, and whether Elam assented to that sale; while B, on the other hand, practically directed a verdict for the defendants, as the facts upon which that instruction is predicated were not disputed by the plaintiff—that is, that the \$1 mentioned in the contract was not actually paid by Elam to Robertson, and that Watkins did not notify Robertson of his purchase of the stock on November 14, 1904, before the attempted withdrawal of the option by Robertson on November 21, 1904.

As opposed to the theory of the case submitted to the jury by these instructions, appellant asked for, among others, three instructions, Nos. 1, 2, and 3, which the court refused. The first is general in its terms, covering the ground specifically mentioned in Nos. 2 and 3, which latter instructions set forth the grounds appearing on the face of the contract between Elam and Robertson, upon which, the court should, as a matter of law, have told the jury that that paper was an irrevocable option.

If the paper in question is to be regarded, as it was regarded by the court below, as merely an option given without a consideration—that is, an offer to sell—it might have been withdrawn by Robertson before acceptance by Elam or an assignee of his, by notice to Elam or such assignee; but if given for a valuable consideration it could not have been withdrawn by Robertson before the time specified therein expired. *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881, 1 Ann. Cas. 986.

In the case cited, the contract or option was treated as though the consideration named therein was actually paid on the day the option was written, and therefore the case has but little bearing upon the consideration of the question presented here.

Whether the contract here is to be treated as a contract made for a valuable consideration depends, first, upon what force and effect is to be given a contract under seal over a like contract not under seal; and, second, whether the recital in the contract that a valuable consideration had been paid by Elam and received by Robertson estops the latter in a court of equity to set up, as a defense to a suit for the specific performance of the contract, that no consideration was in fact paid therefor.

It is earnestly contended (1) that the paper shown by Elam to, and relied upon by, appellant was a valid option, supported by the necessary valuable consideration, as evidenced by the solemn representation on its face, and remained in force from the date of the paper, October 26, 1904, to December 1st following, irrevocable by Robertson; and (2) that Robertson is estopped to deny the recital in the paper,

that he had received a valuable consideration for its execution, and especially will not be permitted to make this denial to the prejudice of an innocent third party, namely, appellant.

There is much conflict among the authorities as to whether courts of equity will decree specific performance of an executory contract or covenant because it is under seal, where it is not also supported by an actual valuable consideration, and many of them take the negative view; but, undoubtedly, this is to be ascribed to the fact that the ancient rule of the common law, that a seal conclusively imports a consideration, has been repealed or modified by statute in most of the states, and text-writers in citing cases fail in many instances to make allowance for this fact.

Upon this subject it is said in section 70, 1 Pomeroy's Eq.: "In most of the states all distinction between sealed and unsealed instruments is abolished, except so far as the statute of limitations operates to bar a right of action; in others, the only effect of the seal upon executory contracts is to raise a *prima facie* presumption of a consideration, while it is still required on a conveyance of land; in a very few, the common-law rule is retained, which makes the seal conclusive evidence of a consideration."

In Virginia we have no statute abolishing or modifying the common-law rule as to the effect to be given to the seal upon executory contracts.

"In a contract under seal, a valuable consideration is presumed from the solemnity of the instrument as a matter of public policy and for the sake of peace, and presumed conclusively, no proof to the contrary being admitted either at law or in equity so far as the parties themselves are concerned." 3 Min. Inst. pt. 2, 139.

We have a number of decisions holding that parol evidence is admissible to show what was the real consideration for a conveyance made of property, where the conveyance was attacked for fraud; but they have no application here, and do not impair the force of the statement which we have just quoted from Minor's Institutes to the effect that no proof is to be admitted, either at law or in equity, to overcome the presumption from the solemnity of the contract under seal that the consideration named was actually paid as between the parties to the contract.

The case of *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501, was a suit in equity for the specific performance of a contract for the sale of certain real estate, and the opinion by Mr. Justice Field says: "The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed. This contract is

plain and certain in its terms, and in its nature and in the circumstances attending its execution appears to be free from objection.

* * * When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them." The opinion further says that it is recognized that this is not invariably the practice, and that this form of relief is not a matter of absolute right to either party, but is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case.

In *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602, the contract specifically enforced was an offer of A. to sell houses to B. within a certain period, the contract being under seal, and it was held that the contract was an irrevocable covenant conditioned upon acceptance within the time named. There it was attempted to withdraw the offer before it had been accepted, and four days afterwards the plaintiff wrote to the defendant that he had purchased in accordance with the offer. The court viewing the contract as an irrevocable covenant conditioned upon acceptance within the time named, because it was under seal, and notice of the acceptance of the offer having been given before the expiration of the time limit, compelled specific performance of the contract. In that case, as in the case at bar, the contention was made that because the defendant could not have compelled the plaintiff to buy before his acceptance of the offer there was a want of mutuality which should defeat the bill. But the court held that the offer being under seal it was an irrevocable covenant, conditioned upon acceptance within ten days, and the written acceptance within that time made it a mutual contract which the plaintiff could enforce. See, also, *Lawson on Contracts*, p. 20.

In *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, the contract or option was in all respects similar to the contract here under consideration, except there the offer was to sell land, while here it is to sell shares of stock of the *Watkins-Cottrell Company*; and the suit was for specific performance of the contract in a court of equity. In the opinion in that case it is said: "Such contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them. *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394. The covenant in the present contract, giving an option to purchase, was in the nature of a continuing offer to sell. It was made under seal, and hence must be regarded as having been made upon a sufficient consideration. When the offer to sell was accepted by the appellant by his notice to the appellees, the contract of sale between the parties was completed, and the appellees were not at liberty to recede from it."

In *Clark on Contracts* (*Hornbook Ser.* [2d Ed.]) p. 33, it is said, upon a number of authorities cited: "Where, however, an offer under

seal in the form of an option is delivered to the offeree, the doctrine that it cannot be revoked applies, and if the option is exercised by acceptance of the offer within the time limited, the agreement will be specifically enforced, or damages may be recovered for its breach." *O'Brien v. Boland*, supra; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Mathews Slate Co. v. New Empire Slate Co.* (C. C.) 122 Fed. 972; *Fuller v. Artman*, 69 Hun (N. Y.) 546, 24 N. Y. Supp. 13; *Willard v. Tayloe*, supra; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761; *Donnelly v. Parker*, 5 W. Va. 301; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

As opposed to the views taken in the authorities to which we have referred, counsel for appellees rely on, among others, the cases of *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894, and *Cummins v. Beavers*, supra. As already remarked, the last-named case did not turn upon the question here under consideration. The first case was decided on the ground that the option contract in question was one-sided and lacking in mutuality, and therefore could not be enforced in a court of equity; but in the later cases of *Central Land Co. v. Johnston*, 95 Va. 223, 28 S. E. 175, and *Cummins v. Beavers*, supra, the decision in *Graybill v. Brugh* was practically overruled. Other authorities, text-writers and decided cases, seem to sustain the view contended for by appellees and taken by the court below, but as the authorities we have cited as supporting the view contended for by appellant are founded upon what appears to us to be the sounder and safer principles and are more in accord with the few decisions by this court bearing upon the question involved, we conclude that they should be followed.

In 9 Cyc., at pages 287, 288, it is said: "3 (b). Options Under Seal.—The common-law rule, that where an offer is made under seal it cannot be revoked, applies to options given under seal. The seal renders a consideration unnecessary, and if the option is exercised by acceptance of the offer within the time limited, the agreement will be specifically enforced, or damages may be recovered for its breach, notwithstanding an attempted revocation."

In support of this text numerous authorities are cited, and those we have been able to examine clearly sustain the view taken. The same author, in a note on page 288, cites a few cases to show that some of the courts do not attach so much sanctity to a seal, and allow evidence to be produced to show there was no consideration for the offer. Among the cases there cited is *Graybill v. Brugh*, supra.

In referring to these cases, in 6 Pom. Eq., note to section 773, it is said, that they must be considered as wrong in principle, overlooking the fact that it is a contract and not an offer the enforcement of which is sought. With reference to *Graybill v. Brugh* it is said that the case "should rest upon another ground—intervening equitable right of a third party—if it is to be supported." In discussing "Unilateral Con-

tracts—Options,” at section 773, the author says: “Courts of equity often speak of enforcing an option as if such enforcement were an apparent exception to the rule of mutuality. In fact, mutuality has nothing to do ordinarily with contracts of option. The option is only a binding offer. The promisor has parted with the right to withdraw his offer. There is nothing to enforce in equity before the exercise of the option, as the promisee has already obtained his right—to have the offer kept open. Upon the exercise of the option—i. e., the acceptance of the offer; and the filing of the bill by the promisee would be one way of exercising it—the option ceases as an option, and equity has an ordinary bilateral contract to deal with. Thus it is usually said that an option to renew a lease is enforceable at the will of the lessee having the option. In fact the lessee must first exercise his option, and then he has a binding contract for the renewal, and not an option. It can make no difference that defendant has tried to withdraw the option. He bound himself not to do so. This view is further supported by the enforcement of an exercised option which was under seal, and without actual consideration. The offer being under seal cannot be withdrawn. Upon its acceptance, the court cannot be concerned with the lack of consideration [which is a good defense to specific performance in equity], for it is the contract and not the option that is being enforced.”

The adding of the words in brackets takes nothing from the force of the paragraph, because the author is there speaking of offers other than those under seal which he says cannot, for the reason that they are under seal, be withdrawn.

Coming then to the consideration of the second proposition, that Robertson is estopped to deny that the offer made in the paper executed by him and Elam was for a valuable consideration, having recited therein the payment of \$1: The English authorities maintain that the recital of a valuable consideration in a deed is conclusive. In the United States it seems to be open to question or explanation for many purposes, but for two it is not: First, the recited consideration can never be questioned or contradicted for the purpose of showing that the deed was not founded on a valuable consideration and so defeat it; nor, second, for the purpose of raising a resulting trust in the grantor. What is meant is that a party making a deed or offer to sell, in writing, cannot himself deny the recital in the paper he executed for the purpose of invalidating his contract or conveyance, or to raise a resulting trust in himself. The recital cannot be disproved but must be treated as conclusive for the purpose of giving effect to the operative words of the conveyance or offer. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Devlin on Deeds*, § 834.

While, as between the parties to a deed of conveyance, or even an executory contract, the recital of the receipt of the consideration would not preclude a recovery of the purchase money due, in the one case, or the real amount of the consideration in the other, the recital of the

payment of a consideration cannot be contradicted so as to defeat the operation of the conveyance according to the purpose therein designated, unless it be on the ground of fraud or illegality. So the obligor in a bond which expressly acknowledges a consideration is estopped to deny the consideration for the purpose of avoiding the bond in the absence of any fraud or mistake. 24 Am. & Eng. Ency. L. 64.

The case of *Lawrence v. McCalmont*, 2 How. 445, 11 L. Ed. 326, held that the principle applied to executory contracts not under seal. And to the same effect is *Silver v. Kent* (C. C.) 105 Fed. 840.

The case of *Guard v. Bradley*, 7 Ind. 600, was a suit for the specific performance of a bond, and the opinion says: "The appellants insist that the bond was without consideration, and that, being merely voluntary, a court of equity will not enforce it. We have no doubt upon the point that a court of equity will not enforce the specific execution of a contract merely voluntary and without consideration, at the instance of a volunteer (citing authorities). But are the obligors in the bond in an attitude to claim the benefit of that rule? We think they are not. This bond or agreement under seal states that the consideration of it is the conveyance made to the obligors by Ezra Guard. By this recital they are estopped, and cannot say it was without consideration. *Trimble v. State*, 4 Blackf. (Ind.) 435; *May v. Johnson*, 3 Ind. 449."

The case of *Fuller v. Artman*, *supra*, was a suit of an assignee to enforce specific performance of an option under seal, and is, therefore, a case in point. On its face it was recited that the option was in consideration "of one dollar and other valuable consideration, the receipt wherefore is hereby acknowledged," though nothing had in fact passed. The opinion says: "The evidence (i. e., that no valuable consideration had actually passed) was no doubt properly excluded. If admitted, it would have done violence to some elementary principle of the law of evidence bearing upon the credit and validity belonging to instruments in writing and under seal. The principles referred to may, perhaps, be embodied in a rule to the effect that while the mere presumption of a consideration which arises from the use of seals in the execution of the instrument is subject to rebuttal (Code Civ. Proc. § 840), the expression of a consideration in such instrument, is not subject to contradiction for the purpose or with the effect of invalidating the instrument. *Murdock v. Gilchrist*, 52 N. Y. 246; *Rockwell v. Brown*, 54 N. Y. 213. The recital of a consideration in a deed is conclusive as to the fact that there was a consideration for the deed. *Grout v. Townsend*, 2 Denio (N. Y.) 336; *Murdock v. Gilchrist*, *supra*. The consideration actually paid or promised may be shown to have been other than that recited in the instrument, or the fact of payment of the consideration agreed upon may be contradicted in an action for its recovery, but the existence of a sufficient consideration when expressed in an instrument under seal is not subject to dispute."

As it seems to us, the rule would apply with greater force where the right of a third party to enforce the contract is involved.

Specific performance was decreed in *Mathews Slate Co. v. New Empire Slate Co.*, supra, upon precisely these grounds. The principle is applied uniformly to insurance cases where the policy contains a formal acknowledgment of the receipt of the premium, upon the ground that this acknowledgment should prevent the insurer from averring and showing nonpayment of the premium for the purpose of denying that the contract ever had any legal existence. Says the opinion in *Basch v. Humboldt, etc., Ins. Co.*, 35 N. J. Law, 429: "What does this receipt in its connection with the delivery of the instrument, import if it does not mean that the payment of the premium is conclusively admitted to the extent that such payment is necessary to give vitality to the contract? Unless this be its meaning, it serves no legal office, for it does not mean that the money has been actually received.

* * * This policy of insurance purports to have an effect immediate on delivery, founded on a paid-up consideration. It does not seem competent for the promisor to prove that the acknowledgment is not true, and that the contract never had any existence. * * * The usual legal rule is that a receipt is only prima facie evidence of payment, and may be explained; but this rule does not apply when the question involved is not only as to the fact of payment, but as to the existence of rights springing out of the contract. With a view of defeating such rights the party giving the receipt cannot contradict it. An acknowledgment of an act done, contained in a written contract, and which act is requisite to put it in force, is as conclusive against the party making it as is any other part of the contract. It cannot be contradicted or varied by parol."

In a similar case, *Kendrick v. Life Ins. Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592, the court says: "The authorities are numerous and quite uniform that the acknowledgment in the policy of the receipt of the premium estops the company to contest the policy on the ground of nonpayment of the premium. In so far as it is a mere receipt for money, it is only prima facie like other receipts, and will not prevent an action to recover the money, if not in truth paid; but in so far as it is a part of the contract of insurance, it cannot be contradicted by parol to invalidate the contract, in the absence of fraud in procuring the delivery of the policy." In support of the principle declared a long list of authorities are cited.

It seems to us clear, both upon reason and authority, that in this case Robertson should not be permitted to deny, certainly as to Watkins who, in his dealing with Elam, undoubtedly relied upon the positive representation on the face of the contract in question that he (Robertson) had received the consideration necessary to its validity and binding force. As we view this case, it would be a denial of justice and a pernicious sanction of unfair dealing to hold that Robertson, who had by his contract in writing, under seal, executed and

delivered to Elam, reciting that it was made and executed for a valuable consideration received, bound himself not to withdraw his offer therein made to sell to Elam or his assigns the 496 shares of the capital stock of the Watkins-Cottrell Company until December 1, 1904, could, after Watkins had been shown the contract, and, relying upon its binding force and effect upon Robertson, before the time limit therein named had expired, accepted the offer and offered to pay the purchase price for the stock, defeat the very object and purpose of the contract by merely showing that this recital in the contract of the receipt of a valuable consideration was untrue.

Contracts or options of this character have, at this day, become of common use in the business world, and dealings had in reliance upon them would become very uncertain, risky, and undesirable if such a contract, as a matter of law, may be converted into a snare and a delusion by permitting the party making it to withdraw from or break it before it expires by its own terms, as though the contract were not under seal, and did not contain a recital that a valuable consideration had been paid therefor. Safety and fair dealing in transactions of this character require that such contracts be regarded as sacred, and as binding upon the parties intended to be bound thereby as other contracts which can only be defeated, impeached, or avoided for fraud or illegality.

We are of opinion, therefore, that the court below should have refused appellees' instructions A, B, and C, and given appellant's instructions Nos. 1, 2, and 3.

The refusal of the court to give certain instructions asked by appellant, predicated upon the agency of Elam for the sale of Robertson's stock in question, and submitting that question of fact to the jury, is assigned as error. But in the view we have taken of the case it is unnecessary to consider this assignment. Nor do we consider it expedient to express an opinion as to the weight of the evidence certified in the record, as the case, because of misdirection of the jury and the admission of improper evidence has to be remanded for a new trial of the issue out of chancery, should the court deem it proper to submit again the issue to a jury.

The decree appealed from is reversed and annulled, and the cause remanded to be further proceeded with, in accordance with the views expressed in this opinion.

CONTRACTS REQUIRED TO BE IN WRITING—STATUTE OF FRAUDS

I. In General—Executed Contracts ¹

STONE v. DENNISON.

(Supreme Judicial Court of Massachusetts, 1832. 13 Pick. 1,
23 Am. Dec. 654.)

At the trial, before Wilde, J., the plaintiff proved that he had been in the service of the defendant from October, 1818, to October, 1828, when he became twenty-one years of age; and he introduced evidence tending to show that his services were worth more than the support and education furnished him by the defendant. Evidence was offered by the defendant tending to show the contrary, and that the agreement was a reasonable one.

The defendant contended that he was not liable, because at the time when the plaintiff was fourteen years of age, his father being dead, George Eels was duly appointed his guardian, and it was agreed between the plaintiff, the defendant and the guardian that the plaintiff should continue in the service of the defendant, until he should arrive at the age of twenty-one, for his board, clothing and education, and the defendant had performed the contract on his part.

The plaintiff objected to the admission of evidence to prove these allegations:

(1) Because the supposed contract was void by the statute of frauds, it not being in writing. * * *

The jury found a verdict for the defendant, and the plaintiff moved for a new trial. * * *

SHAW, C. J.² Several points were left to the jury in the present case, which may be considered as settled by their verdict.

By the report it appears that after the plaintiff arrived at the age of fourteen years, having then lived several years with the defendant, it was agreed between the plaintiff and his guardian on the one side, and the defendant on the other, that the plaintiff should continue in the service of the defendant until he should arrive at the age of twenty-one, for his board, clothing and education. By the finding of the jury, under the instructions given to them by the court, it must be taken to have been settled, that the contract was not obtained by any unfair means, or fraudulent, on the part of the defendant, and that it was not unequal, so as to show that the plaintiff was overreached.

¹ For discussion of principles, see Clark on Contracts (2d Ed.) § 37.

² The statement of facts is abridged and a portion of the opinion omitted.

The case then is one of a minor over fourteen years of age, entering into an agreement with a person, for labor and service to be furnished on one side, and subsistence, clothing and education on the other, an agreement in which the minor was not overreached, which was not so unreasonable as to raise any suspicion of fraud, and which was assented to and sanctioned by the guardian of the minor. This agreement is fully executed on both sides. The labor and services are performed by the minor, and the stipulated compensation is furnished by his employer. And the question is, whether the plaintiff, not withdrawing such agreement, can maintain a quantum meruit for his services, merely by showing that in the event which has happened his services were worth more than the amount of the stipulated compensation; and we think he cannot.

The first point taken by the plaintiff is that the evidence of the agreement ought not to have been admitted, because the agreement, not being to be performed within a year, and not being in writing, was void by the statute of frauds. St. 1788. c. 16, § 1.

But we think this objection is answered by the consideration that here the contract has been completely performed on both sides. The defendant is not seeking to enforce this agreement as an executory contract, but simply to show that the plaintiff is not entitled to recover upon a quantum meruit as upon an implied promise. But the statute does not make such a contract void. The provision is, that no action shall be brought, whereby to charge any person upon any agreement, which is not to be performed within the space of one year, unless the agreement shall be in writing. The statute prescribes the species of evidence necessary to enforce the execution of such a contract. But where the contract has been in fact performed, the rights, duties, and obligations of the parties resulting from such performance stand unaffected by the statute.

In the case of *Boydell v. Drummond*, 11 East, 142, a case was put in the argument of goods sold and delivered at a certain price, by parol, upon a credit of thirteen months. There, as a part of the contract was the payment of the price, which was not to be performed within the year, a question is made, whether by force of the statute the purchaser is exempted from the obligation of the agreement as to the stipulated price, so as to leave it open to the jury to give the value of the goods only, as upon an implied contract. "In that case," said Lord Ellenborough, "the delivery of the goods, which is supposed to be made within the year, would be a complete execution of the contract on the one part; and the question of consideration only would be reserved to a future period."

If a performance upon one side would avoid the operation of the statute, a fortiori would the entire and complete performance on both sides have that effect. Take the common case of a laborer entering into a contract with his employer towards the close of a year, for another year's service, upon certain stipulated terms. Should either par-

ty refuse to perform, the statute would prevent either party from bringing any action whereby to charge the other upon such contract. But it would be a very different question were the contract fulfilled upon both sides, by the performance of the services on the one part and the payment of money on account, from time to time, on the other, equal to the amount of the stipulated wages. In case of the rise of wages within the year, and the consequent increased value of the services, could the laborer bring a quantum meruit, and recover more; or in case of the fall of labor and the diminished value of the services, could the employer bring money had and received and recover back part of the money advanced, on the ground that by the statute of frauds the original contract could not have been enforced? Such, we think, is not the true construction of the statute.

We are of the opinion that it has no application to executed contracts, and that the evidence of this contract was rightly admitted.

* * * Judgment on the verdict.

II. Contracts Within Section 4 *

1. PROMISE BY EXECUTOR OR ADMINISTRATOR

BELLOWS v. SOWLES.

(Supreme Court of Vermont, 1884. 57 Vt. 164, 52 Am. Rep. 118.)

Assumpsit. Heard on demurrer to the declaration, September Term, 1883, Franklin County, Royce, C. J., presiding. Demurrer overruled. The declaration alleged in substance:

That the plaintiff was a relative and heir-at-law of Hiram Bellows, deceased; that by the terms of said Bellows' will, presented to the Probate Court for allowance, no provision was made for the plaintiff; that the plaintiff "claimed and insisted that he was left out of said will, and that no provision * * * was made for the plaintiff through undue influence had and used upon said Bellows by said defendant and his wife, Maggie Sowles, and that said will was void, and should not be approved; that he had employed counsel to test the validity of said will before the Probate Court; that similar claims were made by other heirs"; "and whereas the said defendant being then and there the executor named in said will, and being largely interested pecuniarily in said estate as legatee and the husband of the principal legatee under said will, and well knowing the claim of the plaintiff, and that he had employed counsel as aforesaid, and that other heirs were then and there

* For discussion of principles, see Clark on Contracts (2d Ed.) §§ 39-43.

making similar claims, and being anxious to have said will sustained, had also employed counsel for that purpose; and it was then and there expected by the parties that a contest would be had upon the approval of said will, which would involve the expenditure of a large amount of money, and hinder and delay the settlement of said Bellows' estate, and the receipt by the said defendant and his said wife of their said legacies"; that the plaintiff met the defendant by appointment at defendant's house, and that the matters relating to the will were talked over; that "the plaintiff, at the special instance and request of the said defendant, would see one Charlotte Law, who was one of the heirs of said Bellows, and who was then and there intending to contest the validity of said will, and use his influence to have her allow said will to be approved, and that the plaintiff forbear to contest the approval of said will of said Bellows, and allow the same to be approved by the Probate Court aforesaid, and would not appeal from the decision of said court; he, the said defendant, undertook, and then and there faithfully promised to pay the plaintiff the sum of \$5,000, whenever, after twenty days had elapsed from the date of the approval of said will by said Probate Court he should be thereunto requested. * * *

"And the plaintiff avers, that, confiding in the promise and undertaking of the said defendant so made as aforesaid, afterwards, to wit, on the day and year aforesaid, he did see said Charlotte Law, and did use his influence with her to allow said will to be approved, and did forbear to contest the approval of said will of said Bellows, and did allow the same to be approved by said Probate Court, and did not appeal from said approval"; * * * that said will was duly approved on the 7th day of December, 1876; that no appeal was taken; that the twenty days has elapsed; and that defendant, though requested, has wholly neglected and refused to pay the said \$5,000, &c. There was a second count, substantially like the first, alleging, that the plaintiff was heir-at-law of said Bellows; that he received nothing under the will; that the will was made as it was, and plaintiff left out, "through undue influence and by procurement of the said defendant and his said wife, and that said will was void"; that he had arranged to contest the validity of the will; that this was known to the defendant; that it was "expected by the parties that long and expensive litigation would ensue, which would delay the settlement of said Bellows' estate, and prevent the said defendant and his said wife from receiving the large sums of money which they expected from said estate, as they otherwise would"; that the defendant "being pecuniarily interested in said estate to a large amount as legatee, as husband of the largest legatee under the will," &c.; that defendant promised to pay plaintiff the sum of \$5,000 if he would forbear to contest the will; that he did forbear, in consideration of the promise, &c., &c.

The common counts followed.

POWERS, J. Counsel for the defendant have demurred to the declaration in this case upon two grounds; first, that the consideration alleged is insufficient; secondly, that the promise not being in writing comes within, and is therefore not enforceable under, the Statute of Frauds.

It has been so often held that forbearance of a legal right affords a sufficient consideration upon which to found a valid contract, and that the consideration required by the Statute of Frauds does not differ from that required by the common law, it does not appear to us to be necessary to review the authorities, or discuss the principle. As to the second point urged in behalf of the defendant, this case presents greater difficulties. Although the Statute of Frauds was enacted two centuries ago, and even then was little more than a re-enactment of the pre-existing common law, and though cases have continually arisen under it, both in England and America, yet so confusing and at times inconsistent are the decisions, that its consideration is always attended with difficulty and embarrassment.

The best understanding of the statute is derived from the language itself, viewed in the light of the authorities which seem to us to interpret its meaning as best to attain its object. That clause of the statute under which this case falls, reads: "No action at law or in equity shall be brought * * * upon a special promise of an executor or administrator to answer damages out of his own estate."

This special promise referred to is, in short, any actual promise made by an executor or administrator, in distinction from promises implied by law, which are held not within the statute.

The promise must be "to answer damages out of his own estate." This phraseology clearly implies an obligation, duty, or liability on the part of the testator's estate, for which the executor promises to pay damages out of his own estate. The statute, then, was enacted to prevent executors or administrators from being fraudulently held for the debts or liabilities of the estates upon which they were called to administer. In this view of the case, this clause of the statute is closely allied, if not identical in principle, with the following clause, namely: "No action, etc., upon a special promise to answer for the debt, default or misdoings of another." And so Judge Royce, in delivering the opinion of the court in *Harrington v. Rich*, 6 Vt. 666, declares these two classes of undertakings to be "very nearly allied," and considers them together. This seems to us to be the true idea of this clause of the statute—that the undertaking contemplated by it, like that contemplated by the next clause, is in the nature of a guaranty; and that reasoning applicable to the latter is equally applicable to the former.

We believe this view to be well supported by the authorities. Browne, in his work on the Statute of Frauds, p. 150, says: "In the fourth section of the Statute of Frauds, special promises of executors and administrators to answer damages out of their own estates appear to be spoken of as one class of that large body of contracts known as guaranties." And so on page 184, he interprets "to answer damages"

as equivalent to pay debts of the decedent. This seems to be the construction given to the statute by Chief Justice Redfield, in his work on Wills, vol. II, p. 290, et seq.

The Revised Statutes of New York, vol. II, p. 113, have improved upon the phraseology of the old statute as we have adopted it by adding, "or to pay the debts of the testator or intestate out of his own estate."

If we are correct in this view of the relation between these two clauses, the solution of the question presented by this case is comparatively easy.

It has been held in this State, that when the contract is founded upon a new and distinct consideration moving between the parties, the undertaking is original and independent, and not within the statute. *Templeton v. Bascom*, 33 Vt. 132; *Cross v. Richardson*, 30 Vt. 641; *Lampson v. Hobart*, 28 Vt. 697. Whether or not it would be safe to announce this as a general rule of universal application, it is a principle of law well fortified by authority, that where the principal or immediate object of the promisor is not to pay the debt of another, but to subserve some purpose of his own, the promise is original and independent, and not within the statute. *Brandt Sur.* 72; 3 *Par. Cont.* 24; *Rob. Fr.* 232; *Emerson v. Slater*, 22 *How.* 28, 16 *L. Ed.* 360. And this seems to be the real ground of the decisions above cited in the 28th and 30th Vt., in which the court seems to blend the two rules just laid down.

Pierpoint, J., in delivering the opinion of the court in *Cross v. Richardson*, supra, says: "The consideration must be not only sufficient to support the promise, but of such a nature as to take the promise out of the statute; and that requisite, we think, is to be found in the fact that it operates to the advantage of the promisor, and places him under a pecuniary obligation to the promisee, entirely independent of the original debt."

Apply this rule to this case. Here the main purpose of this promise was, not to answer damages (for the testator) out of his own estate, but was entirely to subserve some purpose of the defendant. The consideration did not affect the estate, but was a matter purely personal to the defendant. Here there was no liability or obligation on the part of the estate to be answered for in damages. It could make no difference to the executor of that estate whether it was to be divided according to the will, or by the law of descent. If the subject matter of this contract had been something entirely foreign to this estate, no one would maintain that the defendant was not bound by it, because he happened to be named executor in this will. Here the subject matter of the contract was connected with the estate, but in such a way that it was practically immaterial to the estate which way the question was decided.

There exists, therefore, in this case, no sufficient, actual, primary liability to which this promise could be collateral. This seems to us

to be the fairest interpretation of the law. The statute was passed for the benefit of executors and administrators; but it might be said of it, as has been said of the protection afforded to an infant by the law of contracts, that "it is a shield to protect, not a sword to destroy." If this class of contracts was allowed to be avoided under it, instead of being a prevention of frauds, it would become a powerful instrument for fraud. As in this case, the plaintiff would be deprived of his legal right to contest the will, by a party who has reaped all the benefit of the transaction, and is shielded from responsibility by a technicality. We do not believe this was the result contemplated by the statute.

The judgment of the County Court overruling the demurrer and adjudging the declaration sufficient is affirmed, and case remanded with leave to the defendant to plead on the usual terms.

2. PROMISE TO ANSWER FOR DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER

LARSON v. JENSEN.

(Supreme Court of Michigan, 1884. 53 Mich. 427, 19 N. W. 130.)

CHAMPLIN, J. The plaintiff claimed that he entered into an agreement with defendant by which he was to furnish and deliver to one John Labonta an unlimited amount of merchandise, as he, Labonta, might call for, or order by mail, or otherwise; and defendant was to pay plaintiff for all the goods so ordered or called for by Labonta; that in pursuance of that agreement plaintiff delivered goods to Labonta, from time to time, at the request of defendant, and, at the time this action was brought, plaintiff claimed a balance due him of about \$400. On the trial the plaintiff gave evidence tending to prove the contract as alleged in the declaration. The plaintiff was the only witness who testified to the contract, and his statement of it was denied by the defendant, who testified that he told plaintiff that Labonta, his son-in-law, was intending to engage in trade in a small way; that he had a little money and that he would help him a little; and asked plaintiff if he could not let Labonta have some goods, and he said he would.

The defendant contends that the contract, as set out in the plaintiff's declaration, is void as being against the statute of frauds, for the reason that the promise of defendant is collateral, and is only to pay the debt or default of Labonta. This is a mistake. The promise and undertaking of defendant, as alleged in the declaration, is an original promise, and rests upon a sufficient consideration. The goods were to be furnished to Labonta, it is true, but upon the express agreement

that defendant should pay for them. Under the declaration, the entire credit was originally given to defendant.

The defendant also insists that, under the evidence, which is all returned in the record, it was the duty of the trial judge to have taken the case from the jury, and decide the case as matter of law in favor of defendant. But this the trial judge could not do, if there was any evidence tending to prove the plaintiff's claim. The testimony of the plaintiff, however inconsistent with itself, tended, in some parts thereof, to sustain the declaration, and the effect and weight to be given to it was solely a question for the jury, and it would have been error in the court to have taken the case from them.

The court instructed the jury that the burden of proof was upon the plaintiff to show by a fair preponderance of evidence of the existence of the contract, and that in pursuance of such contract he delivered the goods, relying entirely upon the promise of Jensen to pay the debt. And if the jury was satisfied by a fair preponderance of evidence that the bargain was made as plaintiff claimed, and that he relied entirely upon it and never looked to Labonta for his pay, then he was entitled to recover; otherwise he was not entitled to recover. But if the jury believed the theory of defendant, that no contract of this kind was ever made, and that he never agreed to pay any sum whatever absolutely, he is not liable and they should find no cause of action.

The circuit judge placed the case very fully and fairly before the jury, and at the conclusion instructed them as follows: "The only question for you to determine is, 'Was this bargain made between the plaintiff and defendant, whereby goods were to be delivered to Labonta upon the credit of the defendant, and did the plaintiff, relying upon it, deliver the goods solely upon the credit of this man Jensen, and looking to no one else at all for his pay?' That is the question. If you solve that question in favor of the plaintiff, then he is entitled to a verdict; if you solve it against him, then he is not entitled to a verdict. The plaintiff must have looked to the defendant, Jensen, from the beginning to the end of the transaction." There is no error in the charge of the court. We do not think it is open to the criticism that "the charge, as given, assumed that the evidence made out an absolute promise to pay." On the contrary, it was the very question he submitted to the jury, to be determined by them from all the evidence in the case.

The plaintiff testified: "Last August Mr. Jensen came up to me, in Manistee, and made arrangements to furnish his son-in-law goods when he called for them. The object that Mr. Jensen wanted goods for his son-in-law was because he was a roving character, and he would see them paid for. I should deliver the goods to John Labonta, and he would see them paid. He stated the object in wanting the goods: His son-in-law was a sailor by profession, and he wanted to settle him down. He wanted his daughter to run the store, and his

son-in-law to work around the mills, if the store didn't require his services. And I agreed to do so."

If this testimony of the plaintiff was found by the jury to be true, the agreement was not within the statute of frauds. The statute does not prevent a person from buying goods on his own credit, to be delivered to another, unless in writing. In such case the important question is, to whom was the credit given? And this question the court fairly submitted to the jury. And the fact that the goods are charged on the books of the seller to the person to whom they were delivered is not conclusive that they were sold upon his credit. *Foster v. Persch*, 68 N. Y. 400; *Hazen v. Bearden*, 4 Sneed (Tenn.) 48; *Walker v. Richards*, 41 N. H. 388; *Swift v. Pierce*, 13 Allen (Mass.) 136; *Barratt v. McHugh*, 128 Mass. 165; *Champion v. Doty*, 31 Wis. 190; *Ruggles v. Gatton*, 50 Ill. 412.

The plaintiff charged the goods delivered as follows: "John Labonta, by order of Charles Jensen." The plaintiff testified that he gave credit to the defendant when he let the goods go, and, in response to a question put to him on cross-examination by defendant's attorney, "Who did you look to for pay for those goods?" replied: "Jensen;" and that he did not look to Labonta for it. The court instructed the jury that "the way the goods are charged upon the books does not exclude the parties from showing the exact fact to whom the credit was given." While there was no error in this portion of the charge, we think the charge made upon the books is quite as consistent with the view that credit was originally given to defendant as to Labonta; and the testimony received upon the subject as to whom credit was given was unexceptionable.

There are no errors in the record that call for a reversal of the judgment, and therefore it is affirmed. The other Justices concurred.

NUGENT v. WOLFE.

(Supreme Court of Pennsylvania, 1886. 111 Pa. 471, 4 Atl. 15,
56 Am. Rep. 291.)

Case by James Nugent against Frank Wolfe to recover damages arising from the breach of a verbal promise made by the defendant that he would save the plaintiff harmless from any loss occurring to him as security for a stay of execution.*

STERRETT, J. If the verbal agreement which plaintiff offered to prove is within the supplement of 1855 to the statute of frauds and perjuries, there was no error in rejecting the testimony, nor in entering judgment of nonsuit. The supplement declares: "No action shall be brought whereby * * * to charge the defendant upon any

* The statement of facts is abridged.

special promise to answer for the debt or default of another unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized." P. L. 308.

Plaintiff gave in evidence the record of two judgments in favor of the First National Bank of Ravenna, one dated January, 1876, against Powers & Co., and the other March, 1877, against himself as bail for stay of execution on the first-mentioned judgment. He then offered to prove, in substance, that in February, 1876, defendant Wolfe requested him to become bail for stay of execution, and, in consideration of his agreeing to do so, promised and undertook to indemnify and save him "harmless from any loss or liability, and from paying anything by reason of his so going security;" that, relying on said promise and undertaking of defendant, he did become bail for stay of execution on the judgment against Powers & Co. This offer was objected to on the ground that the agreement was not in writing as required by the statute, and the proposed testimony was excluded by the court. In the same connection it was admitted that Powers & Co. became insolvent; that plaintiff was compelled to pay the judgment, then amounting to \$1,499.74, and that defendant, though often requested, had not paid any portion thereof. The question thus presented is whether the alleged agreement which plaintiff was not permitted to prove is within the clause of the supplement above quoted.

The clause in question is copied substantially from the fourth section of the English statute, 29 Car. II, c. 3, which, with slight changes in phraseology, has been generally adopted in this country. During the more than two centuries since its original enactment the construction of this section, and its application to various forms of contract, have been constantly the subject of contention; and on no question, perhaps, has there been greater diversity and contrariety of judicial decision in this as well as in the parent country. Cases of real or apparent hardship have repeatedly led courts to put a strained and unnatural construction on what appears to be a plain and easily comprehended act, passed for the purpose of preventing the commission of fraud and perjury. If time would permit, a review of the many conflicting and irreconcilable decisions that from time to time have been rendered, and the refined distinctions upon which they have been based, would be interesting; but the undertaking would be too great, and withal not specially profitable.

It is very evident the statute was not intended to apply except in cases where, in addition to the promisor and promisee, there is also a third party to whose debt or undertaking the agreement of the promisor relates, and not even then unless the liability of the third party continues. In other words, the agreement, to be within the purview of the statute, must in a certain sense be a collateral and not an original undertaking. Independently of the debt or liability of the third party,

there must, of course, be a good consideration for the collateral or subordinate agreement; such, for example, as a benefit or advantage to the promisor, or an injury to the promisee. It is difficult, if not impossible, to formulate a rule by which to determine whether a promise relating to the debt or liability of a third person is or is not within the statute; but, as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute.

As was said by Mr. Justice Strong in *Maule v. Bucknell*, 50 Pa. 39, 52: "It is undoubtedly true that a promise to answer for the debt or default of another is not within the statute, unless it be collateral to a continued liability of the original debtor. If it be a substitute, an agreement by which the debt of another is extinguished, as where the creditor gives up his claim on his original debtor, and accepts the new promise in lieu thereof, it need not be in writing. And, as the cases referred to show, it may be unaffected by the statute; though the original debt remains, if the promisor has received a fund pledged, set apart, or held for payment of the debt. But, except in such cases, and others, perhaps, of a kindred nature, in which the contract shows an intention of the parties that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable, the rule, it is believed, may be safely stated that while the old debt remains the new must be regarded as not an original undertaking, and therefore within the statute. At least, this may be stated as a principle generally accurate. In *Wms. Saund.* 211, note, it is said: 'The question whether each particular case comes within the clause of the statute or not depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.'"

If one says to another, "Deliver goods to A., and I will pay you," the verbal promise is binding, because A., though he receives the goods, is not responsible to the party who furnishes them. But if, instead of saying, "I will pay you," he says, "I will see you paid," or "I will pay you if he does not," or uses words equivalent thereto, showing that the debt is in the first instance the debt of A., the undertaking is collateral, and not valid unless in writing. In these latter cases, the same consideration, viz., the consideration of the promise of the principal, is a good consideration for the promise of the surety or collateral promisor. The credit is given as well upon the original consideration of the principal as the collateral promise of the surety, and is

a good consideration for both. *Nelson v. Boynton*, 3 Metc. (Mass.) 396, 400, 37 Am. Dec. 148. Other applications of the principles above stated might be suggested, but it is unnecessary to do so.

In the case before us the only consideration for the alleged agreement, disclosed by plaintiff's offer, is the disadvantage to him—the risk he incurred—by becoming bail for stay of execution on the judgment against Powers & Co. If they failed to pay their debt, then in judgment, at the expiration of the stay, he thereupon became fixed for the amount thereof. In consideration of the risk or contingent liability thus assumed by plaintiff at defendant's request, the latter promised and agreed to pay the judgment, or see that it was paid by Powers & Co., and thus save plaintiff from the necessity of paying the same: in other words, defendant specially promised, for a good and valid consideration, to answer for the default of Powers & Co. in not paying the judgment at expiration of the stay. Such is the nature and character of the agreement on which plaintiff claimed to recover; and it appears to come within the letter as well as the spirit of the clause under consideration. If it is not an agreement to answer for the debt or default of Powers & Co., it would be difficult to say what it is. Their liability to the bank still remained. The only consideration moving between the promisor and promisee, as claimed by the latter, is the risk he incurred in becoming bail for Powers & Co. There is no testimony, nor was any offered, to show that defendant had any personal interest in the judgment on which bail was entered, or that he held property or funds that should have been applied to the payment thereof. So far as appears, it was the proper debt of Powers & Co., and the substance of defendant's agreement is that he would see that they paid it; and, if they failed to do so, he would pay it for them. It was literally a promise to answer for the default of Powers & Co. Plaintiff's liability as bail for stay was merely collateral to the debt in judgment, and had in contemplation nothing but the payment thereof to the bank.

Without pursuing the subject further, we are satisfied the alleged promise of defendant is within the statute, and cannot be enforced because it is not in writing. Our own cases are in accord with this view. *Allshouse v. Ramsay*, 6 Whart. 331, 37 Am. Dec. 417; *Shoemaker v. King*, 40 Pa. 107; *Miller v. Long*, 45 Pa. 350; *Maule v. Bucknell*, *supra*; *Townsend v. Long*, 77 Pa. 143, 18 Am. Rep. 438. The object of the statute is protection against "fraudulent practices commonly endeavored to be upheld by perjury," and it should be enforced according to its true intent and meaning, notwithstanding cases of great hardship may result therefrom. There never was a time in the history of our jurisprudence when the necessity for such a statute was greater than now, when persons in interest, as well as parties to the record, are generally competent witnesses. Judgment affirmed.

3. AGREEMENT IN CONSIDERATION OF MARRIAGE

HUNT v. HUNT et al.

(Court of Appeals of New York, 1902. 171 N. Y. 396, 64 N. E. 159,
59 L. R. A. 306.)

Suit by Lena E. Hunt against Joseph T. Hunt and another, as executors of Wilson G. Hunt, deceased. From a judgment of the appellate division of the supreme court (66 N. Y. Supp. 957) affirming a judgment in favor of the defendants, the plaintiff appeals.⁵ * * *

WERNER, J. This action was brought to compel the specific performance of an oral antenuptial contract which was entered into between the plaintiff and Wilson G. Hunt, the testator of the defendants, prior to their intermarriage in October, 1896. Under said contract, and in consideration of plaintiff's promise to marry said Wilson G. Hunt, the latter orally agreed to give the former at once the sum of \$5,000 in money, the further sum of \$2.50 per week, the income of a house and lot in the city of Geneva, N. Y., to convey to her another house and lot in the same city, and to make a will giving her all of his property except a watch and \$200. The making of this contract, the subsequent intermarriage of the parties thereto, and the still later breach of the agreement by said Wilson G. Hunt, are established by the findings of the learned trial court, and upon these findings it based the conclusion of law that plaintiff is not entitled to recover because said contract is void under the statute of frauds.

Under the unanimous affirmance of the learned appellate division the only question brought to this court by the appellant is whether a parol antenuptial contract, founded upon no other consideration than marriage, can be specifically enforced in a court of equity. The statute provides that "every agreement or undertaking made upon consideration of marriage, except mutual promises to marry," shall be void unless such agreement or undertaking, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith, or his agent. 2 Rev. St. pp. 135, 136, c. 7, tit. 2, §§ 2, 8. The learned counsel for the appellant concedes that the contract in suit falls within the scope of this broad statute, but argues that the intermarriage of the parties to the contract is such a part performance thereof as to invest a court of equity with the power of specific enforcement. The argument for the respondents may be compressed into the single statement that the same act of performance which brings the contract within the sweep of the statute cannot be relied upon to exclude it therefrom.

⁵ The statement of facts is abridged.

The most notable feature of the statute above quoted is its simplicity and directness of language. All contracts founded upon consideration of marriage, except mutual promises to marry, shall be void unless the commands of the statute are obeyed. Mutual executory promises to marry are expressly excluded from its operation. All other contracts founded upon consideration of marriage are as clearly within its terms. These two divers provisions of the statute, standing in juxtaposition to each other, so plainly disclose the legislative intent as to render construction unnecessary, if not impossible. The letter of the law bears its own interpretation. This view of the statute is not original.

Pomeroy, in his work on Contracts, under the head of "Specific Performance" (2d Ed. § 111), states it most forcibly as follows: "When a verbal contract is made in relation to or upon the consideration of marriage, the marriage alone is not a part performance upon which to decree specific execution. This rule, which is firmly established, is based upon the express language of the statute. A promise made in anticipation of a marriage, followed by a marriage, is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision which makes a writing essential. In fact, until a marriage takes place, there is no binding agreement independent of the statute, so that the marriage itself is a necessary part of every agreement made upon consideration of it, which the legislature has said must be in writing."

Beach, in his *Modern Equity Jurisprudence* (section 622), says: "It is well settled that marriage is not an act of part performance which will take a parol contract out of the statute, for the statute expressly provides that a contract in consideration of marriage shall not be binding unless it is in writing."

This is also the view of the statute entertained by the courts of England and the courts in other jurisdictions where the English statute of frauds has been copied. *Caton v. Caton*, L. R. 2 H. L. 127, affirming 1 Ch. App. 137; *Taylor v. Beech*, 1 Ves. Sr. 297; *Dundas v. Dutens*, 1 Ves. Jr. 196; *Lassence v. Tierney*, 1 Macn. & G. 551; *Warden v. Jones*, 23 Beav. 487; *Peck v. Peck*, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244; *Bradley v. Saddler*, 54 Cal. 681; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *Henry v. Henry*, 27 Ohio St. 121.

In our own state the trend of the decisions is in the same direction. In *Brown v. Conger*, 8 Hun, 625, it was held that equity cannot enforce a parol contract for the conveyance of lands made in consideration of a marriage subsequently consummated. In *Dygart v. Remerschmider*, 32 N. Y. 629, this court enforced, as against the creditors of the husband, an oral antenuptial contract under which the latter conveyed lands to his wife; but the decision was based upon the distinct ground that the payment by the wife of some of the husband's debts

created an independent consideration for the transfer, and in his discussion of that fact Judge Davies said: "Under the authorities, I think she [the wife] had no right, based solely upon the consideration of marriage, which courts, either of law or equity, could have enforced." To the same effect are *Lamb v. Lamb*, 18 App. Div. 250, 46 N. Y. Supp. 219; *Ennis v. Ennis*, 48 Hun, 11; *Whyte v. Denike*, 53 App. Div. 320, 65 N. Y. Supp. 577; *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520; *Borst v. Corey*, 16 Barb. 136; and *In re Willoughby*, 11 Paige, 257.

In none of these cases, except *Brown v. Conger*, supra, was the question presented in precisely the same form as in the case at bar, but in all of them the validity of a parol antenuptial contract was a pertinent and underlying question, upon which the courts have held with unvarying uniformity that marriage is not such a part performance of a parol antenuptial contract as to take it out of the operation of the statute of frauds.

Counsel for the appellant vigorously contends that in the case at bar the statute of frauds is being used by the respondents as an instrument of fraud, and that this is a consummation that equity never tolerates. In support of this position we are referred to such cases as *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Winchell v. Winchell*, 100 N. Y. 159, 2 N. E. 897; *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; *Ahrens v. Jones*, 169 N. Y. 555, 62 N. E. 666, 88 Am. St. Rep. 620; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; *Dunckel v. Dunckel*, 141 N. Y. 427, 36 N. E. 405; and other cases in which equity has intervened to prevent the perpetration of fraud in the name of the statute. There is no analogy between such cases and the case at bar. Courts of equity, in exercising their powers upon the statute of frauds, are bound by two important limitations. The first is that equity will never interfere where there is an adequate remedy at law (*Russell v. Briggs*, 165 N. Y. 500, 59 N. E. 303, 53 L. R. A. 556), and the second is that equity cannot repeal the statute (*Dung v. Parker*, 52 N. Y. 494).

The first of these limitations has, of course, no application to the case at bar, because the appellant is clearly without a remedy at law. The second of these limitations is applicable here, for the reason that the statute must be repealed before the contract in suit can be enforced. It is just here that we observe the essential difference between this case and those upon which the appellant relies. In the latter class of cases equity intervenes because the language of the statute is so general and elastic as to compel, or at least permit, the presumption that it was not designed to operate as a shield for fraud. In cases like the one at bar the language of the statute is so specific and rigid that no presumption can be invoked that conflicts with the letter of the law, although in certain cases great injustice may ensue.

Counsel for the appellant also insists that there was evidence tend-

ing to show that Wilson G. Hunt made a will in pursuance of the antenuptial contract and in conformity with its terms, and that this fact of itself establishes such a part performance of the contract as to take it out of the statute. We cannot discuss this question upon the merits, because the trial court has made no finding upon the subject. We have no right to amplify the findings of fact in order to make a sufficient ground for reversal. *Hilton v. Ernst*, 161 N. Y. 227, 55 N. E. 1056.

The judgment herein should be affirmed, with costs. Judgment affirmed.

4. CONTRACT OR SALE OF LANDS, OR ANY INTEREST IN OR CONCERNING THEM

GREEN v. ARMSTRONG.

(Supreme Court of New York, 1845. 1 Denio, 550.)

BEARDSLEY, J.⁶ A verbal contract was made between these parties, by which the defendant agreed to sell certain trees then standing and growing on his land, to the plaintiff, with liberty to cut and remove the same at any time within twenty years from the making of the contract. A part of the trees were cut and removed under this agreement, but the defendant then refused to permit any more to be taken, and for this the plaintiff brought his action in the justice's court, where a judgment was rendered in his favor. On the trial of the cause the defendant objected to proof of such parol contract, but the objection was overruled. The judgment was removed by certiorari to the court of common pleas of Oneida county, and was reversed by that court, on the ground, as the record states, that the contract, not being in writing, was void by the statute of frauds. * * *

The Revised Statutes declare that no "interest in lands" shall be created, unless by deed or conveyance in writing; and that every contract for the sale of "any interest in lands" shall be void unless in writing. 2 Rev. St. 134, §§ 6, 8. Certain exceptions and qualifications to these enactments are contained in the sections referred to, but none which touch the question now before the court: and so far as respects this question the former statute of New-York, and the English statute of 29 Car. II. c. 3, contain similar provisions. 1 R. L. 1813, p. 78; Chit. Cont. 299.

The precise question in this case is, whether an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is a contract for the sale of an interest in land.

⁶ The statement of facts and a portion of the opinion are omitted.

If it is, it must follow that the one declared on in this case, not being in writing, was invalid, and the judgment of the common pleas, reversing that of the justice, was correct and must be affirmed.

And in the outset I must observe, that this question has not, to my knowledge, been decided in this state. It has, however, arisen in the English courts, and in some of those of our sister states; but their decisions are contradictory, and the views of individual judges wholly irreconcilable with each other. Greenl. Ev. (2d Ed.) § 271, and notes; Chit. Cont. 299-302; 4 Kent, Comm. (5th Ed.) 450, 451. We are, therefore, as it seems to me, at full liberty to adopt a broad principle, if one can be found, which will determine this precise question in a manner which our judgments shall approve, and especially if it be equally applicable to other and analogous cases.

By the statute, a contract for the sale of "any interest in lands" is void unless in writing. The word land is comprehensive in its import, and includes many things besides the earth we tread on, as waters, grass, stones, buildings, fences, trees and the like; for all these may be conveyed by the general designation of land. 1 Shep. Touch. (by Preston), 91; 1 Inst. 4; 1 Preston, Est. 8; 2 Bl. Comm. 17, 18; 1 Rev. St. 387, § 2; 2 Rev. St. 137, § 6. Standing trees are therefore part and parcel of the land in which they are rooted, and as such are real property. They pass to the heir by descent as part of the inheritance, and not, as personal chattels do, to the executor or administrator. Toller, Ex'rs, 193-195; 2 Bl. Comm. (by Chitty) 122, note; Rob. Frauds, 365, 366; Liford's Case, 11 Coke, 46; Com. Dig. "Biens," (H). And being strictly real property, they cannot be sold on an execution against chattels only. Scorell v. Boxall, 1 Younge & J. 396; Evans v. Roberts, 5 Barn. & C. 829.

It is otherwise with growing crops, as wheat and corn, the annual produce of labor and cultivation of the earth; for these are personal chattels, and pass to those entitled to the personal estate, and not to the heir. Toller, 150, 194; 2 Bl. Comm. 404. They may also be sold on execution like other personal chattels. Whipple v. Foot, 2 Johns. 418, 3 Am. Dec. 442; Jones v. Flint, 10 Adol. & E. 753; Peacock v. Purvis, 2 Brod. & B. 362; Hartwell v. Bissell, 17 Johns. 128.

These principles suggest the proper distinction. An interest in personal chattels may be created without a deed or conveyance in writing, and a contract for their sale may be valid although by parol. But an interest in that which is land, can only be created by deed or written conveyance: and no contract for the sale of such an interest is valid unless in writing. It is not material and does not affect the principle, that the subject of the sale will be personal property when transferred to the purchaser. If, when sold, it is, in the hands of the seller, a part of the land itself, the contract is within the statute. These trees were part of the defendant's land and not his personal chattels. The contract for their sale and transfer, being by parol, was therefore void.

The opinion of the court in the case of Dunne v. Ferguson, 1 Hayes,

542, contains one of the best illustrations of this question. That case is thus stated in Steph. N. P. 1971: "The facts of the case were, that in October, 1830, the defendant sold to the plaintiff a crop of turnips, which he had sown a short time previously, for a sum less than ten pounds. In February, 1831, and previously, while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use. No note in writing was made of the bargain. It was contended for the defendant, that the action of trover did not lie for things annexed to the freehold, and that the contract was of no validity for want of a note or memorandum in writing pursuant to the statute of frauds. Upon the foregoing facts Chief Baron Joy observed (Barons Smith, Pennefeather and Foster, concurring): 'The general question for our decision is, whether there has been a contract for an interest concerning lands, within the second section of the statute of frauds? or whether it merely concerned goods and chattels? And that question resolves itself into another, whether or not a growing crop is goods and chattels? In one case it has been held, that a contract for potatoes did not require a note in writing, because the potatoes were ripe: and in another case, the distinction turned upon the land that was to dig them, so that if dug by A. B. they were potatoes, and if by C. D. they were an interest in lands. Such a course always involves the judge in perplexity, and the case in obscurity. Another criterion must, therefore, be had recourse to; and, fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law, growing crops were uniformly held to be goods; and they were subject to all the leading consequences of being goods, as seizure in execution, &c. The statute of frauds takes things as it finds them, and provides for lands and goods according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop has been held to be an interest in lands, it would come within the second section of the act, but if it were only goods and chattels, then it came within the thirteenth section. On this, the only rational ground, the cases of *Evans v. Roberts*, 5 Barn. & C. 829; *Smith v. Surman*, 9 Barn. & C. 561; and *Scorell v. Boxall*, 1 Younge & J. 396,—have been decided. And as we think that growing crops have all the consequences of chattels, and are like them, liable to be taken in execution, we must rule the points saved for the plaintiff.'"

Various other decisions have proceeded on the same principle, although it has nowhere been stated and illustrated with the same clearness and force as in the opinion of Chief Baron Joy.

The following cases may be cited to show that growing crops of grain and vegetables, *fructus industriales*, being goods and chattels, and not real estate, may be conveyed by a verbal contract, as they may also be sold on execution as personal chattels. *Carrington v. Roots*, 2 Mees. & W. 248; *Sainsbury v. Matthews*, 4 Mees. & W. 343; *Randall v.*

Ramer, 2 Johns. 421, note; Mumford v. Whitney, 15 Wend. 387, 30 Am. Dec. 60; Austin v. Sawyer, 9 Cow. 39; Jones v. Flint, 10 Adol. & E. 753; Warwick v. Bruce, 2 Maule & S. 205; Graves v. Weld, 5 Barn. & Adol. 105.

But where the subject matter of a contract of sale, is growing trees, fruit or grass, the natural produce of the earth, and not annual productions raised by manurance and the industry of man, as they are parcel of the land itself, and not chattels, the contract, in order to be valid must be in writing. Teal v. Auty, 2 Brod. & B. 99; Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470; Olmstead v. Niles, 7 N. H. 522; Crosby v. Wadsworth, 6 East, 602; Rodwell v. Phillips, 9 Mees. & W. 501; Jones v. Flint, 10 Adol. & E. 753.

The contract in this case was within the statute, and being by parol was void. The judgment of the common pleas must be affirmed. Judgment affirmed.

5. AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR

DOYLE v. DIXON.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 208,
93 Am. Dec. 80.)

Action by John Doyle against John Dixon for breach of a contract by which the defendant, on selling his stock of groceries and good will to the plaintiff, agreed not to go into the grocery business in Chicopee for a period of five years. The defendant contended that the agreement was within the statute of frauds as an agreement not to be performed within a year, and that, as it was not in writing, the plaintiff could not recover; but the judge ruled the contrary. There was a verdict for the plaintiff, and the defendant excepted.

GRAY, J.⁷ It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds, which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in *Peters v. Westborough*, 19 Pick. 364, 31 Am. Dec. 142, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended

⁷ The statement of the facts is abridged and a portion of the opinion is omitted.

upon the contingency of the child's life, and, if the child should die within one year, would be fully performed.

On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in *Hill v. Hooper*, 1 Gray, 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year. *Lyon v. King*, 11 Metc. (Mass.) 411, 45 Am. Dec. 219; *Worthy v. Jones*, 11 Gray, 168, 71 Am. Dec. 696.

An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds.

* * * Exceptions overruled.

III. Form Required ⁸

1. CONTENTS OF WRITING

ULLSPERGER v. MEYER.

(Supreme Court of Illinois, 1905. 217 Ill. 262, 75 N. E. 482, 2 L. R. A. [N. S.] 221, 3 Ann. Cas. 1032.)

Bill by Anton Ullsperger against Charlotte Meyer. From a decree of a dismissal, complainant appeals.

RICKS, J.⁹ This was a suit for specific performance of a certain contract set out in appellant's bill of complaint, which is, in substance, as follows: It alleges: That on the 8th day of January, 1905, defendant was seised and possessed, in fee simple, of real estate situated in the city of Chicago, county of Cook, and state of Illinois, described as follows: The real estate and premises known as No. 1031 Milwaukee avenue, which are otherwise and legally described as lot 13 in the subdivision of the westerly half of block 11, in McReynold's subdivision of part of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 6, township 39 N., range 14 E. of the 3d P. M. That, being so seised, on that date said defendant agreed to sell said premises and real estate to the complainant for the sum of \$14,000, and the complainant agreed to purchase said real estate and to pay said defendant therefor said sum of \$14,000. That on that date, to evidence the sale and purchase, the said Charlotte Meyer, by the name of C. Meyer, executed a certain document in writing, which document is in the words and figures following: "Chicago, Jan. 8, 1904. Received of Anton Ullsperger \$100 on said purchase of the property No. 1031 Milwaukee ave., at the price of \$14,000. C. Meyer."

The bill further alleges: That the said document bears date January 8, 1904, but in fact the same was written and signed by the defendant on the 8th day of January, 1905, and that an error and mistake were made by the person writing said document in stating the date as 1904, instead of 1905. That the said premises, described as No. 1031 Milwaukee avenue in said document aforesaid, are the same premises and real estate above described as lot 13, etc., and in the purchase of said premises aforesaid the complainant intended to purchase said lot 13, and said defendant intended to sell to the complainant said lot 13, aforesaid. That the complainant has always been willing to comply with the terms of the agreement on his part to be performed, and that a few days after the said 8th day of January,

⁸ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 44-46.

⁹ A portion of the opinion is omitted.

1905, complainant applied to said defendant and offered to pay her the sum of \$13,900, being the balance then due to the defendant under the said agreement, on said defendant delivering to the complainant a sufficient deed for said premises according to said agreement; and the defendant refused, and still refuses, to comply with said agreement on her part, although the complainant is and always has been ready and willing to pay said sum of \$13,900 and to fully perform his part of said agreement whenever the defendant will make and deliver to complainant a good and sufficient deed for said premises aforesaid. That the defendant, subsequent to executing said document aforesaid, informed the complainant that she would not accept the balance of \$13,900, and would not sell and convey said premises and real estate to the complainant in accordance with said agreement, and absolutely refused to carry said agreement out.

The bill makes said Charlotte Meyer a party defendant, and prays that she may answer said bill not under oath, answer under oath being waived, and that the defendant may be decreed specifically to perform the said agreement entered into and make a good and sufficient deed of conveyance to the complainant of said premises, the complainant being ready and willing, and thereby offering specifically to perform said agreement on his part upon the defendant making out a good and sufficient title to the said premises and executing a proper conveyance thereof to the complainant pursuant to the terms of said agreement, and to pay the defendant the residue of said purchase money, and for general relief. To the bill general and special demurrers were filed, and the demurrers were sustained, and a decree was accordingly entered dismissing the bill for want of equity; and this appeal is prosecuted to review that decree.

The principal question presented for our consideration is whether or not the memorandum of writing entered into was sufficient to take the contract out of the statute of frauds and perjuries. The statute of frauds and perjuries (Hurd's Rev. 1903, p. 995, c. 59) reads:

"Sec. 2. No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party."

Section 3 of the same chapter reads: "The consideration of any such promise or agreement need not be set forth or expressed in the writing, but may be proved or disproved by parol or other legal evidence."

From the reading of the above sections of the statute it will be seen that it is only necessary that some memorandum or note be made of the contract and signed by the party to be charged therewith. "The statute does not require that the contract itself shall be reduced to

writing. It is sufficient if there be a memorandum of the contract in writing, signed by the party to be charged or by some one by him duly authorized. *Cossitt v. Hobbs*, 56 Ill. 231; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Spangler v. Danforth*, 65 Ill. 152; *Wood v. Davis*, 82 Ill. 311. No particular form of language is necessary to constitute the memorandum requisite to satisfy the requirements of the statute. An admission in writing of the bargain having been made, although it may not furnish exclusive evidence of the contract, as a final agreement would do, or an offer in writing so stating the proposal that its mere acceptance would fix the terms of the bargain, will, if accepted, satisfy the statute, and the acceptance of the offer in writing may be shown by parol. *Browne on Statute of Frauds*, § 345a; *Esmay v. Gorton*, 18 Ill. 483, and authorities *supra*; *Farwell v. Lowther*, 18 Ill. 252." *Lasher v. Gardner*, 124 Ill. 441, 16 N. E. 919.

The authorities are agreed that if the memorandum shall contain on its face the names of the parties vendor and vendee, a sufficiently clear and explicit description of the thing, interest, or property as will be capable of identification, together with the terms and conditions of the contract, and signed by the party to be charged, it will be sufficient upon which to predicate a decree for specific performance. *McConnell v. Brillhart*, *supra*. The contract or memorandum set up in the bill, while in the nature of a receipt, clearly evidences a sale of the property therein described as having taken place from appellee to appellant, and acknowledges that \$100 has been paid upon the purchase price of \$14,000 by appellant. Appellant is named as the purchaser, and the text of the writing clearly designates appellee as the vendor by whom the writing is signed; so that it will be seen that the contract or writing relied upon contains all that is required by the statute, and more, as the statute does not require that the consideration shall be stated in the writing but authorizes it to be established by parol.

It is insisted that there is no time specified for the completion of the contract, and that therefore the contract is not complete. Under such a contract the law would imply that it was to be performed within a reasonable time after entering into the same, and what would be a reasonable time would be a matter of proof under all the conditions and circumstances that might surround the case. *Gibson v. Brown*, 214 Ill. 330, 73 N. E. 578; *Driver v. Ford*, 90 Ill. 595; *Hamilton v. Scully*, 118 Ill. 192, 8 N. E. 767; *Biddison v. Johnson*, 50 Ill. App. 173. Time was not made the essence of the contract in question, and the bill was not obnoxious to demurrer because of the absence of the provision specifying the time in which the performance should take place. The allegation in the bill touching that matter is that appellant, within a few days after the making of the contract, applied to appellee for performance on appellee's part, and that appellant at the same time

offered to perform on his part by paying the full balance of the purchase price. * * *

It is urged that this contract lacks in the material element of mutuality. The particular ground upon which this contention is based is that the contract is signed by appellee only. It is found in option contracts, and unilateral contracts generally, that the rule here contended for has no application; that the mere verbal acceptance by the second party to the contract, or the vendee, or the person holding the option, with notice thereof to the vendor and an offer to perform, renders the contract mutual and binding.

But it is said that in the particular contract before us there was no future act or option contemplated, and that the contract had all its validity at the time it was originally made, and that to entitle specific performance of such contract there must be mutuality of obligation and remedy. It is difficult to understand upon what substantial ground the difference in the rule applicable to the two sets of contracts contended for, if it exists, is based. We are unable to understand why the mere written option signed by the vendor shall bind him by the verbal acceptance of the vendee and his offer to perform be held to be a mutual and binding contract within the statute of frauds, and the contract of sale acknowledging the receipt of part payment, signed by the vendor, shall be held void for want of mutuality upon the alleged ground that the vendee has not bound himself to perform by some writing. We are aware that there is a diversity of opinion and a contrariety of holdings by the courts of last resort in the various states upon this subject; but a careful review of the authorities leads us to conclude that a contract otherwise clear and explicit is sufficient to meet the requirements of the statute of frauds, if signed by the vendor.

In 29 Am. & Eng. Enc. Law (2d Ed.) the subject under consideration is extensively discussed and the authorities touching it reviewed, and the conclusion there announced is (page 858): "The weight of authority is that the statute is satisfied if the memorandum be signed by the parties sought to be charged alone, or, in other words, by the party defendant in an action brought to enforce the contract, whether he be vendor or vendee. In the case of a contract for the sale of lands, the vendor is usually the person to be charged, and a memorandum signed by him alone is valid. The party not signing the memorandum is not bound unless, as held by some authorities, he has accepted the same as a valid, subsisting contract. Want of mutuality arising from the failure of both parties to sign cannot be successfully pleaded as a defense by the party who did sign, as the act of filing a bill for specific performance binds the plaintiff and renders the contract mutual."

A reference to the authorities there cited shows that the rule thus obtains in England and in the majority of the United States. Speaking of this rule, Mr. Pomeroy, in his work on Specific Performance

(section 75), in part says: "It may, perhaps, be sustained upon the following grounds: The statute of frauds does not reach the substance of contracts and render them valid or invalid. It simply furnishes a rule of evidence. Whenever, therefore, any agreement is enforced against a defendant who has signed it by a plaintiff who has not, it cannot be said that the agreement, so far as it purports to bind the plaintiff, is a nullity. In the suit against him the statute does no more than require a certain kind of proof in case he avails himself of it as a defense. The defense, however, is wholly a personal one, and if he neglects to set it up the agreement would be established against him, notwithstanding the statute. For these reasons it cannot be said that a memorandum signed by one party alone is so completely wanting in mutuality that no action upon it can be sustained."

Mr. Story, in his *Equity Jurisprudence* (volume 2, § 736a), says: "But it is not necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it. If the agreement is certain, fair, and just in all its parts, and signed by the party sought to be charged, that is sufficient. The want of mutuality is no objection to its enforcement."

Parsons, in his work on *Contracts* (volume 2, p. 290), says: "And it is now quite settled that the agreement need not be signed by both parties, but only by him who is to be charged by it. And he is estopped from denying the execution of the instrument on the ground that it wants the signature of the other party."

Early in the nineteenth century the question came before Chancellor Kent, and in two cases (*Parkhurst v. Van Cortlandt*, 1 Johns. Ch. [N. Y.] 282, and *Benedict v. Lynch*, 1 Johns. Ch. [N. Y.] 370, 7 Am. Dec. 484) the chancellor intimated that the rule was as contended for by appellee. But in 1817, in *Clason v. Bailey & Vorhees*, 14 Johns. (N. Y.) 484, the question was again before him for consideration, and the authorities are fully reviewed, and the conclusion of the chancellor is thus stated (page 486): "Clason's name was inserted in the contract by his authorized agent, and if it were admitted that the name of the other party was not there by their direction, yet the better opinion is that Clason, the party who is sought to be charged, is estopped by his name from saying that the contract was not duly signed within the purview of the statute of frauds, and that it is sufficient if the agreement be signed by the party to be charged. It appears to me that this is the result of the weight of authority both in the courts of law and equity." After reviewing the authorities the chancellor further said (page 489): "I have thought, and often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce at his pleasure an agreement which the other was not entitled to claim. It appears to be settled (*Hawkins v. Holmes*, 1 P. Wms. 770) that, though the plaintiff has signed the agreement, he cannot enforce it

against the party who has not signed it. The remedy, therefore, in such case, is not mutual. But, notwithstanding this objection, it appears from the review of the cases that the point is too well settled to be now questioned." To like effect is *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103.

So far as we are advised the question was first presented to this court in *Johnson v. Dodge*, 17 Ill. 433, 442. That was a bill for specific performance of a contract for the sale of land signed by the vendor only. The vendee was to pay one-fourth in cash and one-fourth in one, two, and three years, respectively. He paid \$50 at the time the writing was made and delivered to him. The vendee offered to perform and the vendor refused, when the vendee's bill was filed and dismissed for want of equity. This court reversed the decree of the lower court, and upon the subject now being considered said: "It was not necessary to the obligation of the contract that it should have been signed by the vendee. His acceptance and possession of the contract, and payment of money under it, are unequivocal evidences of his concurrence, and constitute him a party as fully and irrevocably as his signing the contract could"—citing 2 Parsons on Contracts, 290; *McCrea v. Purmort*, supra; *Shirley v. Shirley*, 7 Blackf. (Ind.) 452; *Estes v. Furlong*, 59 Ill. 298; *Cossitt v. Hobbs*, 56 Ill. 231.

In *Esmay v. Gorton*, 18 Ill. 483, 486, it is said: "While the contract must be mutual, the current of authorities seems to settle the construction of the statute of frauds as only requiring the signature of the party to be charged, and the party so charged, on bill for specific performance, may not allege the want of the signature of the other contracting party." To like effect are *Farwell v. Lowther*, 18 Ill. 252; *Perkins v. Hadsell*, 50 Ill. 216; *Estes v. Furlong*, supra; *Spangler v. Danforth*, 65 Ill. 152; *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118; *Memory v. Niepert*, 131 Ill. 623, 23 N. E. 431; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790; *Forthman v. Deters*, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145.

The case of *Forthman v. Deters*, supra, is a very late case and on all fours with the case at bar, and in which the question now before us was fully considered, and the conclusion there reached and announced is that where a party accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and is bound by them, and that, where the contract purports to be a consummated contract, the mere acceptance and adoption of the writing establishes mutuality and makes the contract binding on both parties. We deem that case conclusive of the case at bar. We regard the rule as too well established to be open that appellee, who is the vendor having signed the writing herein above set forth, cannot defeat performance upon the ground of want of mutuality, based upon the fact alone that appellant, the vendee, did not sign the same. The appellant had paid part of the consideration and had offered to pay the whole of it within a few days of the making of

the contract, and unless appellee by her answer shall show that to enforce the same would be inequitable, for some reason other than the mere want of the signature of appellant to the contract, we are of the opinion that she should be required to perform.

It is suggested that the chancellor is vested with discretion in the granting of specific performance, and that therefore this court will not enforce a decree wherein that discretion has been exercised and relief denied. The discretion with which the chancellor is vested is a legal, and not arbitrary, discretion. He may only exercise his discretion and deny relief when the facts and doubtful, or the contract or some of its terms are so uncertain that injustice might arise. No such condition here exists.

The decree of the circuit court is reversed, and the cause remanded to that court, with directions to overrule the demurrer and for such further proceedings as to justice and equity shall appertain. Decree reversed.

2. SEPARATE PAPERS

LOUISVILLE ASPHALT VARNISH CO. v. LORICK et al.

(Supreme Court of South Carolina, 1885. 29 S. C. 533, 8 S. E. 8,
2 L. R. A. 212.)

Action by the Louisville Asphalt Varnish Company against Preston C. Lorick and William B. Lowrance, partners, trading as Lorick & Lowrance, to recover for goods sold them. At the trial, a nonsuit was granted, and judgment rendered for defendants. Plaintiff appeals.

McIVER, J.¹⁰ This was an action to recover the sum of \$83.05, the price of certain varnish and paint alleged to have been sold by plaintiff to defendants. The defense was a general denial. At the trial the plaintiff offered testimony tending to show that on the 16th October, 1885, one of its traveling salesmen, Hutchinson by name, took from Moore, a clerk of defendants, who, it was admitted, had authority to give the order, a verbal order for the articles specified in the account sued on, which Hutchinson immediately entered in his memorandum book as follows:

No. 65.	Columbia, S. C., Oct. 16, 1885.
Louisville Asphalt Varnish Co., Louisville, Ky.	
Ship Lorick & Lowrance, Columbia, S. C.:	
1 Bbl. No. 1 Turpt. Asphalt Black Varnish.....	55c.
1 " " D. Roof Paint C.....	50c.
12 5 gall. Pails D. Roof, do.....	55c
Cr. by 2c gal., on acct. freight.	
60 days.	H. L. Hutchinson, Salesman.

¹⁰ The dissenting opinion of Simpson, C. J., is omitted.

On the same day, a copy of this order was sent by mail, by said salesman, to the plaintiff, who received it on the 19th October, 1885, and on the next day shipped the goods, by rail, to defendants. On the 17th October, 1885, the defendants wrote to plaintiff as follows: "Louisville Asphalt Varnish Co., Louisville—Gents: Don't ship paint ordered through your salesman. We have concluded not to handle it." This letter, however, was not received by plaintiff until after the goods had been shipped; and upon its receipt plaintiff wrote defendants, saying "that the shipment had gone before the request to cancel was received." When the goods arrived in Columbia, the defendants declined to receive them, but what became of them the testimony does not show.

At the close of plaintiff's testimony, defendants moved for a non-suit, which was granted, upon the ground that section 2020, Gen. St., (statute of frauds,) was fatal to a recovery. Plaintiff appeals, upon the several grounds set out in the record which make these two questions: First, whether there was such a note or memorandum in writing of the bargain as would satisfy the requirements of section 2020 of the General Statutes; second, if not, whether there was such an acceptance and actual receipt of the goods as would take the case out of the operation of that section.

It is quite certain that there was no formal agreement in writing, signed by the parties to be charged, for the sale of the goods in question, and we think it equally certain that there was no single instrument or memorandum in writing sufficient to satisfy the requirements of the statute; for the letter of the defendants, copied above, did not specify the necessary particulars as to quantity, nature, and price of the goods which were the subjects of the alleged contract of sale, and the copy of the order sent by the salesman to the plaintiff, which did contain all the necessary particulars, was not signed by the defendants. It is plain, therefore, that neither one of these papers, standing alone, would be sufficient. But as it is well settled that the whole agreement need not appear in a single writing, but may be made out from several instruments or written memoranda referring one to the other, and which, when connected together, are found to contain all the necessary elements, the precise, practical question in this case is whether the letter of defendants can be connected with the written order sent by the salesman, so that the two together may constitute a sufficient note or memorandum in writing to satisfy the requirements of the statute.

In *Saunderson v. Jackson*, 2 Bos. & P. 238, the action was for not delivering certain articles alleged to have been sold by defendant to plaintiff, and the question was whether there was a sufficient note or memorandum in writing of the bargain, under the statute of frauds. It seems that when the plaintiff gave the verbal order for the goods, he was furnished by the defendant with a bill of parcels, not signed, but written on a piece of paper, with a printed heading containing

the name and place of business of defendant. Shortly after this, defendant wrote a letter to plaintiff, saying: "We wish to know what time we shall send you a part of your order," etc. The court held that the requirements of the statute were complied with, saying: "This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract, within the meaning of the statute. * * * At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the statute of frauds; for, although it be admitted that the letter, which does not state the terms of the agreement, would not alone have been sufficient, yet, as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given by the plaintiff, signed by the defendants."

This case has been expressly recognized and followed in this state, in *Toomer v. Dawson*, Cheves, 68. The same doctrine was applied in *Western v. Russell*, 3 Ves. & B. 188. See, also, to the same effect, *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343, where, as in the case now under consideration, the letter of defendant was written for the purpose of withdrawing from the contract; but as it referred to the previous order, the two, taken together, were held to satisfy the terms of the statute. In a note to that case, at page 347 of the volume of American Reports above cited, we find the following:

"In *Cave v. Hastings*, 7 Q. B. Div. 125, an action for breach of a contract for the hire of a carriage for more than a year from the date of the agreement, at a specified sum per month, it was proved that the plaintiff agreed to let the carriage to the defendant. A memorandum of the terms of the agreement was signed by the plaintiff, but not by the defendant. The defendant subsequently wrote a letter to the plaintiff, desiring to terminate the agreement, in which he referred to 'our arrangement for the hire of your carriage,' and 'my monthly payment.' There was no other arrangement between the parties, to which the expressions of the defendant could have any reference, except the agreement contained in the memorandum signed by the plaintiff. Held, that the letter of the defendant was so connected, by reference, to the document containing the terms of the arrangement, as to constitute it a note and memorandum of the contract, signed by him, within the fourth section of the statute of frauds. The court said: 'There is abundant evidence that there was an agreement which was not rescinded; but the defendant now contends that he is not liable, because he signed no memorandum in writing of the contract.' It has, however, been long settled that the whole agreement need not appear in one document, but the agreement may be made out from several documents. The only document signed in this case by the defendant was the letter of the 11th February, which does not, in itself, contain the terms of the contract. In *Dobell v. Hutchinson*, 3 Adol. & E. 355, Lord Denman states the law on this subject to be as fol-

lows: 'The cases on the subject are not, at first sight, uniform; but on examination it will be found that they establish this principle: that when a contract or note exists which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them.' This letter in question refers to 'our arrangement.' Mr. Gully, in his argument, contended that that might refer to some other and different parol arrangement; but it seems to us that this reference to the former document is sufficient, in accordance with the principle laid down in *Ridgway v. Wharton*, 6 H. L. Cas. 237, where 'instructions' were referred to, and it was held that parol evidence might be given to identify the instructions referred to with certain instructions in writing. This principle was applied in *Baumann v. James*, 16 Law T. (N. S.) 165, and carried still further in *Long v. Millar*, 41 Law T. (N. S.) 306, in which Bramwell, L. J., says: 'The first question to be considered is whether there is a contract, valid according to the provisions of the statute of frauds, section 4. I think that there is a sufficient memorandum. The plaintiff has signed a document containing all the terms necessary to constitute a binding agreement, so that, if he committed a breach of it, he would be liable to an action for damages or to a suit for specific performance. But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt also uses the word "purchase," which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence.' He then goes on to add: 'I may further illustrate my view by putting the following cases: Suppose that A. writes to B., saying that he will give £1,000 for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return, "I accept your offer." In that case, there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B. is that made by A. without infringing the statute of frauds, section 4, which requires a note or memorandum in writing.' "

These observations, coming as they do from high authority, seem so appropriate to the present case that we have felt justified in inserting them at length. In *Beckwith v. Talbot*, 95 U. S. 289, 24 L. Ed. 496, it was held that, while the general rule is "that collateral papers adduced to supply the defect of signature of a written agreement, under the statute of frauds, should on their face sufficiently demonstrate their reference to such agreement, without the aid of parol proof," yet such rule is not absolute, as "there may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof." Accordingly, it was

held in that case that "the defendant, unless he could show the existence of some other agreement, was estopped from denying that the agreement referred to by him in his letters was that which he induced the plaintiff to sign." Even in the case of *Johnson v. Buck*, 35 N. J. Law, 338, 10 Am. Rep. 243, which seems to be much relied on by the counsel for respondents, it is conceded that parol evidence may be received "to identify papers which, by a reference in the signed memorandum, are made parts of it." While it is true that some of the cases which we have cited arose under the fourth section of the statute of frauds, and not under the seventeenth section, which controls the present case, yet it is admitted by Kent, C. J., in *Bailey v. Ogden*, 3 Johns. (N. Y.) 412, 3 Am. Dec. 509, that the words of the two sections are in this respect similar, and require the same construction, and it was so held in *Townsend v. Hargraves*, 118 Mass. 325.

It seems to us, therefore, that the letter of defendants, taken, as it must be, in connection with the order sent to plaintiff by the salesman, to which it expressly referred, and which was in writing, and specified all the necessary particulars as to price, quantity, quality, and time of payment, constituted a sufficient note or memorandum in writing of the bargain to take the case out of the statute of frauds. In the absence of any evidence that any other order was given, the language of the letter—"Don't ship paint ordered through your salesman"—must necessarily be regarded as referring to the order of which a memorandum in writing was taken at the time by the salesman, and a copy thereof immediately forwarded to the plaintiff, who at once filled the order, and shipped the goods to the defendants. This is a stronger case than that of *Beckwith v. Talbot*, *supra*, for there the letter of the defendant simply referred to the agreement, without indicating, when or how it had been made, while here the letter refers to a particular article "ordered through your salesman," and we hear of no other order through the salesman or in any other way. The only necessity for any parol evidence at all, if, indeed, there was any, was to identify the order sent by the salesman, and for this purpose, as we have seen, such evidence would be competent.

Suppose the plaintiff had, on the 16th October, 1885, written a letter to defendants, proposing to sell them the articles mentioned in the salesman's order, in the quantities there stated, and at the prices and on the time there mentioned, and that defendants had replied by letter, simply saying, "I accept your offer," without repeating the particulars as to quantity, price, etc., it could not be doubted that, although defendants' letter—the only paper which they signed—did not contain in itself the necessary particulars of the bargain, yet the two letters, taken together, would be held a sufficient compliance with the statute. It seems to us that the transaction here in question was in principle practically the same as that in the supposed case, and we think there was error in holding that the contract sued on was void under the statute of frauds.

We do not see how it is possible to regard the letter of the defendants as a denial of the order given to the salesman by their clerk, Moore, who, it was conceded, had authority to give the order, for the only testimony upon the subject is that of the salesman, who says distinctly that Moore gave him the order, and he entered it in his memorandum book, and there is no evidence to the contrary. Moore was not examined as a witness. It is true that, after the controversy between these parties had arisen, the defendants, in a letter as late as 31st December, 1885, addressed to the attorney who had been consulted by the plaintiff, do repudiate the purchase; but that is not the letter relied upon by plaintiff to establish the contract. On the contrary, the one relied on is that of the 17th October, 1885, which has been copied above, and the question is whether the last-mentioned letter can be regarded as a denial of having given the order. The manifest purpose of that letter was to countermand the order, and this necessarily presupposed that the order had been given. The terms used clearly show this: "Don't ship the paint ordered through your salesman. We have concluded not to handle it." This clearly means that the paint had been ordered, but that defendants had subsequently changed their minds and "concluded not to handle it;" and we don't see how it can be construed to mean anything else. We have then an admission in writing that an order for the goods in question through the salesman had been given and we have the order referred to, likewise in writing; and the two together fully satisfy the requirements of the statute.

Under the view which we have taken of the first question raised by this appeal, the second question becomes immaterial, and need not, therefore, be considered. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

McGOWAN, J., concurs. SIMPSON, C. J., dissents.

3. BY WHOM SIGNED

See Ullsperger v. Meyer, *supra* page 74.

IV. Effect of Noncompliance ¹¹

BRITAIN v. ROSSITER.

(Court of Appeal, 1879. 11 Q. B. Div. 123.)

Action for wrongful dismissal.

At the trial it appeared that the plaintiff entered into the defendant's service as clerk and accountant for one year.

The plaintiff and the defendant had interviews upon the 17th, 19th, and 21st of April, 1877. The 21st was a Saturday, and the plaintiff entered upon the defendant's service upon Monday, the 23d. The final arrangement between the parties was arrived at upon the Saturday.

The plaintiff remained some months in the defendant's service and was then dismissed without a three months' notice. The defendant relied upon the statute of frauds (section 4). At the trial before Hawkins, J., the verdict was entered for the defendant upon the grounds: First, that the contract was made finally upon Saturday, the 21st of April, and being made upon that day was within the statute of frauds (section 4); secondly, that there was no evidence of a new contract on Monday, April the 23d, it not being proved that the contract made on the previous Saturday was altered or rescinded. The exchequer division having refused a new trial on the ground of misdirection:

1878, May 29. Mr. Firth moved in this court, by way of appeal. He contended: First, that the contract of service for one year was to begin from Monday, the 23d of April, and therefore that it was a contract to be performed within a year; secondly, that the plaintiff could not be dismissed without notice, a verbal contract being in existence; thirdly, that the contract having been partly performed, was taken out of the statute of frauds (section 4). As to the first point he cited *Cawthorne v. Cordrey*, 13 C. B. (N. S.) 406, 32 Law J. C. P. 152.

BRETT, L. J.¹² Upon the best consideration which I can give to this case, it seems to me that this rule should be discharged. I think that Hawkins, J., was right, and that the exchequer division was also right. It was clearly established that on Saturday, the 21st of April, a contract of service was in express terms entered into between the plaintiff and the defendant that the plaintiff should serve the defendant for one year, the contract to commence the Monday following. It cannot be disputed that a contract of that kind is within the 4th section of the statute of frauds,—that is to say, it is a promise founded upon

¹¹ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 50, 51.

¹² The statement of facts is abridged and the opinion of Brett, L. J., on another point is omitted.

a sufficient consideration,—but, it being only verbal, neither party can bring an action upon it so as to charge the other.

It is, however, contended that as the plaintiff did on Monday, the 23d of April, enter into the defendant's service and continue in it for some months, another contract to serve for a year ought to be implied, attended with the same consequences as the original contract, but outside the statute of frauds. It is alleged that this contract can be implied, because the contract originally entered into is void. But, according to the true construction of the statute, it is not correct to say that the contract is void; and, in my opinion, no distinction exists between the 4th and the 17th sections of the statute. At all events, the contract is not void under the 4th section. The contract exists, but no one is liable upon it. It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact. It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract, which is still subsisting. All that can be said is that no one can be charged upon the original contract because it is not in writing.

At the bar reliance was placed upon *Carrington v. Roots*, 2 Mees. & W. 248, and *Reade v. Lamb*, 6 Exch. 130. In the former case Parke, B., said: "I think the right interpretation of" the 4th section of the statute of frauds "is this: that an agreement which cannot be enforced on either side is as a contract void altogether." In the latter, Pollock, C. B., said: "*Carrington v. Roots*, 2 Mees. & W. 248, is in effect a decision that, for the purposes of the present question, there is no distinction between the 4th and 17th sections of the statute of frauds, and that not only no action can be brought upon an agreement within the 4th section of that statute if it be not reduced into writing, but that the contract is also void." With regard to these dicta it is enough to say that the doctrine thereby laid down was unnecessary for the decisions in those cases; for it being clear that no action can be brought on the verbal contract itself, it is also clear that neither party can be held liable upon it indirectly in any action which necessitates the admission of the existence of the contract.

The two cases which I have mentioned were considered in *Leroux v. Brown*, 12 C. B. 801; and *Jervis, C. J.*, undoubtedly took the same view of them as I do, and gave the interpretation necessary for that case, namely, that the contract is not void, but only incapable of being enforced, and that any claim which depends upon the contract as such cannot be maintained. If the contrary view had prevailed, it would have been decided in that case that the statute of frauds (section 4), had a territorial operation; whereas if it applies merely to the enforcement of the contract, then it is a statute with respect to the procedure of the English courts, and it is applicable to contracts made abroad as well as in England. Moreover, the case of *Snelling v. Lord Hunt-*

ingfield, 1 Crompton, M. & R. 20, has not been overruled by subsequent cases, but the doctrine there laid down has been strongly supported by subsequent cases, and in my opinion it certainly ought not to be overruled now. In my view the contract entered into on the 21st of April was not void, but existing, and from a part performance of it a fresh contract ought not to be implied. The plaintiff, therefore, is driven to rely upon the original contract, but he cannot maintain an action upon that, inasmuch as it is not in writing.

It has been further contended that, as the contract of the 21st of April has been partly performed, it may be enforced, notwithstanding the statute of frauds, and that the equitable doctrine as to part performance may be applied to it. It is well known that where a contract for the sale of land had been partly performed, courts of equity did in certain cases recognize and enforce it; but this doctrine was exercised only as to cases concerning land, and was never extended to contracts like that before us, because they could not be brought within the jurisdiction of courts of equity. Those courts could not entertain suits for specific performance of contracts of service, and therefore a case like the present could not come before them. As to the application of the doctrine of part performance to suits concerning land, I will merely say that the cases in the court of chancery were bold decisions on the words of the statute. The doctrine was not extended to any other kind of contract before the judicature acts. Can we so extend it now? I think that the true construction of the judicature acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the courts either of law or of equity. If they did more, they would alter the rights of parties, whereas in truth they only change the procedure.

Before the passing of the judicature acts no one could be charged on this contract either at law or in equity; and if the plaintiff could now enforce this contract, it would be an alteration of the law. I am of opinion that the law remains as it was, and that the plaintiff cannot maintain this action for breach of contract.

COTTON, L. J. We refuse to grant a rule on the ground that the contract entered into on Saturday, the 21st of April, was to be performed within a year, and therefore not within the operation of the 4th section of the statute of frauds. The contract clearly was within that enactment. On the other points we granted a rule, but after having heard the arguments on behalf of the plaintiff, I think that the rule for a new trial must be discharged. It has been contended that although the express contract cannot be enforced, nevertheless a contract which can be enforced may be implied from conduct of the parties, and it has been argued that the rule does not apply which forbids a contract to be implied where an express contract has been concluded, because the contract was void under the provisions of the statute of frauds (section 4); but in my opinion that is not the true construction

of the enactment, which provides that no action shall be brought to charge any person upon the verbal contract.

In the first place, I may observe that to hold that this enactment makes void verbal contracts falling within its provisions, would be inconsistent with the doctrine of the courts of equity with regard to part performance in suits concerning land. If such contracts had been rendered void by the legislature, courts of equity would not have enforced them, but their doctrine was that the statute did not render the contracts void, but required written evidence to be given of them; and courts of equity were accustomed to dispense with that evidence in certain instances. During the argument some decisions were relied upon as shewing that the contract in the present case was void. In *Carrington v. Roots*, 2 Mees. & W. 248, certain expressions were used by the judges which indicated that in their opinion a verbal contract falling within section 4 was void; but I think that their language, when carefully analyzed, merely means that the contract was not enforceable, either directly or indirectly by action at law. I think it unnecessary to go into the case of *Reade v. Lamb*, 6 Exch. 130. It was a case decided upon special demurrer, and the question to which the attention of the judges was directed, was whether the pleadings were correct in point of form.

It has been further argued that the contract may be enforced, because it has been in part performed. Let me consider what is the nature of the doctrine as to part performance. It has been said that the principle of that doctrine is that the court will not allow one party to a contract to take advantage of part performance of the contract, and to permit the other party to change his position or incur expense or risk under the contract, and then to allege that the contract does not exist; for this would be contrary to conscience. It is true that some dicta of judges may be found to support this view, but it is not the real explanation of the doctrine, for if it were, part payment of the purchase money would defeat the operation of the statute. But it is well established and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th section. What can be more contrary to conscience than that after a man has received a large sum of money in pursuance of a contract, he should allege that it was never entered into? The true ground of the doctrine in equity is that if the court found a man in occupation of land, or doing such acts with regard to it as would, *prima facie*, make him liable at law to an action of trespass, the court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken.

Does this doctrine, when so explained, apply to the present case? I will first mention the provisions of Judicature Act 1873, § 24, subsecs. 4, 7. These provisions enable the courts of common law to deal with

equitable rights and to give relief upon equitable grounds; but they do not confer new rights. The different divisions of the high court may dispose of matters within the jurisdiction of the chancery and the common law courts; but they cannot proceed upon novel principles. Could the present plaintiff have obtained any relief in equity before the passing of the judicature acts? I think that he could not. The doctrine as to part performance has always been confined to questions relating to land; it has never been applied to contracts of service, and it ought not now to be extended to cases in which the court of chancery never interfered.

THESIGER, L. J. Two questions must be considered in this case: First, whether the plaintiff could maintain an action at law; secondly, whether, if he could not maintain an action at law, he could maintain a suit in equity. I am compelled to subscribe to the opinion that the plaintiff had no remedy either at law or in equity. I have been unwilling to come to this conclusion, because it is manifestly unjust that where a contract of hiring has been acted on for a certain time, one party who has had the advantage of it should be able to put an end to it; and I should have been glad to decide that the plaintiff was entitled to a reasonable notice of dismissal.

First, has the plaintiff a right of action at law? It is clear that a contract was made on Saturday, the 21st of April, and it cannot be contended that a contract made at that date to commence from the 23d of April is not within the 4th section of the statute of frauds. It is necessary to consider what is the effect of the statute upon such a contract. Is it that the contract is wholly null so that it does not prevent the proof of any other contract, or is it that the contract exists but cannot be enforced? Certain dicta are to be found in the books from which it might appear that some of the judges have considered the verbal contract as absolutely void. But if those dicta are carefully examined, it will be found that they are not necessary for the decision of the cases in which they appear, and upon referring to subsequent cases it will be found that it has been decided in clear terms that the verbal contract is not actually void. It is impossible to say that the words of the statute make the verbal contract void. That a verbal contract is not void, is proved by the circumstance that where one party may be charged upon it, but that the party who has not signed cannot be charged.

It may also be urged with some show of reason that though there is a difference in language between the 4th and 17th sections of the statute of frauds, they are substantially identical in construction, and *Carrington v. Roots*, 2 Mees. & W. 248, and *Reade v. Lamb*, 6 Exch. 130, may perhaps be cited in support of that argument. And it is plain that verbal contracts under the 17th section are not absolutely void for all purposes, for the section provides that part performance by payment or acceptance and receipt of goods shall authorize the court to look at the terms of the contract, although it is not in writing. But I need not

discuss this question further, for in *Snelling v. Huntingfield*, 1 Crompt. M. & R. 20, which has never been overruled, but, on the contrary, has been often followed, it was held that a contract not enforceable by reason of the statute of frauds (section 4) nevertheless existed, and no contract can be implied where an express contract exists. I think that we are bound by the authority of that case. There was, therefore, in existence a contract made in express terms on Saturday, the 21st of April, and the plaintiff cannot sue upon it, as it is not in writing. It appears to have been held that, though there may be no right to recover on an executory contract, nevertheless, if it has been executed to the extent of the contractee entering upon the service, that is enough to entitle him to be paid for his services, and if we were not bound by authority it would be difficult to understand why, if the plaintiff can sue for services rendered, he should not equally be entitled to allege that he shall not be dismissed without notice or without such notice as was stipulated for in the contract. But in *Snelling v. Huntingfield*, 1 Crompt. M. & R. 20, the court of exchequer appears to have thought that the contractee can recover for services rendered but not for dismissal without notice. This seems to have been the construction at common law.

If we turn to equity, we find that it has been held as regards a sale of land, that when there has been an entry by one party to the contract, that is an overt act apparently done under a contract which entitles the court to look at the contract to see to what contract the overt act is really referable. I confess that on principle I do not see why a similar doctrine should not be applied to the case of a contract of service, and as the doctrine of equity is based upon the theory that the court will not allow a fraud on the part of one party to a contract on faith of which the other party has altered his position, I do not see why a similar doctrine should not comprehend a contract of service. At the same time I feel that doctrines of this nature are not to be unwarrantably extended, and that we ought not to go further than the decisions of courts of equity as to the principles of relief, and as to the instances to which the doctrine of part performance is to be applied. Therefore, as we cannot clearly see that the equitable doctrine of part performance ought to be extended to contracts of service, I think that we ought to keep within the limits observed by the court of chancery before the passing of the judicature acts of 1873 and 1875.

Rule discharged.

V. Contracts Within Section 17¹³

1. WHAT ARE GOODS, WARES, AND MERCHANDISES

BALDWIN v. WILLIAMS.

(Supreme Judicial Court of Massachusetts, 1841. 3 Metc. 365.)

This case was tried before Wilde, J., who made the following report of it:

This was an action of assumpsit, and the declaration set forth an agreement of the plaintiff that he would bargain, sell, assign, transfer, and set over to the defendant, and indorse without recourse to him, the plaintiff, in any event, two notes of hand by him held, signed by S. J. Gardner; one dated April 24th, 1835, for the payment of \$1,500; the other dated May 5th, 1836, for the payment of \$500; and both payable to the plaintiff or order on the 3d of April, 1839, with interest from their dates. The declaration set forth an agreement by the defendant, in consideration of the plaintiff's agreement aforesaid, and in payment for said Gardner's said notes, to pay the plaintiff \$1,000 in cash, and to give the plaintiff a post note, made by the Lafayette Bank, for \$1,000, and also a note signed by J. B. Russell & Co. and indorsed by D. W. Williams for \$1,000.

The plaintiff at the trial proved an oral agreement with the defendant as set forth in the declaration, and an offer by the plaintiff to comply with his part of said agreement, and a tender of said Gardner's said notes, indorsed by the plaintiff without recourse to him in any event, and a demand upon the defendant to fulfil his part of said agreement, and the refusal of the defendant to do so. But the plaintiff introduced no evidence tending to show that any thing passed between the parties at the time of making the said agreement, or was given in earnest to bind the bargain.

The judge advised a nonsuit upon this evidence, because the contract was not in writing nor proved by any note or memorandum in writing signed by the defendant or his agent, and nothing was received by the purchaser, nor given in earnest to bind the bargain. A nonsuit was accordingly entered, which is to stand if in the opinion of the whole court the agreement set forth in the declaration falls within the statute of frauds (Rev. St. c. 74, § 4); otherwise, the nonsuit to be taken off, and a new trial granted.

WILDE, J. This action is founded on an oral contract, and the question is, whether it is a contract of sale within the statute of frauds.

¹³ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 55, 56.

The plaintiff's counsel contends in the first place that the contract is not a contract for the sale of the notes mentioned in the declaration, but a mere agreement for the exchange of them; and in the second place that if the agreement is to be considered as a contract of sale, yet it is not a contract within that statute.

As to the first point, the defendant's counsel contends that an agreement to exchange notes is a mutual contract of sale. But it is not necessary to decide this question, for the agreement of the defendant, as alleged in the declaration, was to pay for the plaintiff's two notes \$2,000 in cash, in addition to two other notes; and that this was a contract of sale is, we think, very clear.

The other question is more doubtful. But the better opinion seems to us to be, that this is a contract within the true meaning of the statute of frauds. It is certainly within the mischief thereby intended to be prevented; and the words of the statute, "goods" and "merchandise," are sufficiently comprehensive to include promissory notes of hand. The word "goods" is a word of large signification; and so is the word "merchandise." "*Merx est quicquid vendi potest.*"

In *Tisdale v. Harris*, 20 Pick. 9, it was decided that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute; and the reasons on which that decision was founded seem fully to authorize a similar decision as to promissory notes of hand. A different decision has recently been made in England in *Humble v. Mitchell*, 3 Perry & D. 141, 11 Adol. & E. 207. In that case it was decided that a contract for the sale of shares in a joint-stock banking company was not within the statute of frauds. But it seems to us that the reasoning in the case of *Tisdale v. Harris* is very cogent and satisfactory; and it is supported by several other cases. In *Mills v. Gore*, 20 Pick. 28, it was decided that a bill in equity might be maintained to compel the redelivery of a deed and a promissory note of hand, on the provision in the Rev. St. c. 81, § 8, which gives the court jurisdiction in all suits to compel the redelivery of any goods or chattels whatsoever, taken and detained from the owner thereof, and secreted or withheld, so that the same cannot be replevied. And the same point was decided in *Clapp v. Shephard*, 23 Pick. 228. In a former statute (St. 1823, c. 140), there was a similar provision which extended expressly to "any goods or chattels, deed, bond, note, bill, specialty, writing, or other personal property." And the learned commissioners, in a note on the Rev. St. c. 81, § 8, say that the words "'goods or chattels' are supposed to comprehend the several particulars immediately following them in St. 1823, c. 140, as well as many others that are not mentioned."

The word "chattels" is not contained in the provision of the statute of frauds; but personal chattels are movable goods, and so far as these words may relate to the question under consideration they seem to have the same meaning. But however this may be, we think the present case cannot be distinguished in principle from *Tisdale v. Har-*

ris; and upon the authority of that case, taking into consideration again the reasons and principles on which it was decided, we are of opinion that the contract in question is within the statute of frauds, and consequently that the motion to set aside the nonsuit must be overruled.

V
HEINTZ et al. v. BURKHARD.

(Supreme Court of Oregon, 1896. 29 Or. 55, 43 Pac. 866, 31 L. R. A. 508, 54 Am. St. Rep. 777.)

Action by A. R. Heintz & Co. against Joseph Burkhard. From a judgment of nonsuit, plaintiffs appeal.

BEAN, C. J. This action was brought to recover damages for the breach of a contract to furnish the ironwork for defendant's building, and comes here on an appeal from a judgment of nonsuit. For the purposes of this appeal, it is sufficient to say that the evidence tended to show that in August, 1894, the plaintiff and defendant entered into an oral contract, by the terms of which the plaintiff was to manufacture, and furnish to the defendant, the ironwork for a brick building about to be erected by him, according to certain plans and specifications, for the sum of \$2,825, but that defendant subsequently, and before any work was performed, wrongfully refused to allow plaintiff to proceed with the execution of its contract. The ironwork referred to was not to be of the kind manufactured by the plaintiff in the usual course of business, or for the trade, but of special designs and measurements suitable only for use in the construction of defendant's building. The court below ruled that the contract was "an agreement for the sale of personal property," within the meaning of subdivision 5, § 785, of Hill's Annotated Laws, and void because not in writing, and this ruling presents the only question to be determined on this appeal.

To determine whether a given contract concerning personal property, which does not exist in specie at the time it is entered into, but must be manufactured and brought into being under the contract, comes within the statute of frauds, is not without difficulty, and the decisions are by no means reconcilable. The chief difficulty in all such cases is encountered in determining when the contract is substantially for the sale of personal property, to be executed in the future, and when for work and labor and material only. If the former, it is within the statute. If the latter, it is not. Thus far the authorities, except in the state of New York, are substantially agreed; but there have been numerous decisions, and much diversity and even conflict of opinion, in relation to a proper rule by which to determine whether a contract is in fact for the sale of personal property, and therefore within the statute, or for work and labor and material furnished, and so without the statute.

There appear to be substantially three distinct views upon the statute, which, for convenience, are generally designated as the English, the New York, and the Massachusetts rules, as represented by the decisions of their respective courts. In England, after a long series of cases in which various tests have been suggested, the rule seems to have been settled in *Lee v. Griffin*, 1 Best & S. 272, that "if the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." In that case the action was brought by a dentist to recover £21 for two sets of artificial teeth made for the defendant's testatrix. The court held the contract to be for the sale of chattels, and within the statute. But this decision seems to stand alone, and is in direct conflict with the previous decisions of the English courts. *Towers v. Osborne*, 1 Strange, 506; *Clayton v. Andrews*, 4 Burrows, 2101; *Rondeau v. Wyatt*, 2 H. Bl. 63; *Cooper v. Elston*, 7 Term R. 14; *Groves v. Buck*, 3 Maule & S. 178; *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Smith v. Surman*, 9 Barn. & C. 574. It is said to have been the result of Lord Tenterden's act, which expressly extended the statute to all contracts of sale, notwithstanding the goods "may not at the time of such contract be actually made, procured or produced or fit or ready for delivery, or some act may be required for the making or completing thereof to render the same fit for delivery." *Meincke v. Falk*, 55 Wis. 432, 13 N. W. 545, 42 Am. Rep. 722; *Benj. Sales* (6th Ed.) 108.

In this condition of the English authorities, we are not prepared to go to the full extent of *Lee v. Griffin*. It is an extreme case, and, unless the decision was made to conform to Lord Tenterden's act, it antagonizes the opinions of some of the most eminent jurists of England, and is open to the objection that it practically permits the fraud which theoretically the statute seeks to prevent. To say that a contract of a dentist to manufacture and furnish a set of false teeth for his customer is "an agreement for the sale of personal property," within the meaning of the statute, is certainly giving it the widest possible operation, and has not found general recognition in this country, as a correct exposition of the doctrine, although the simplicity of the rule has commended it to many of the judges.

In New York the rule prevails that a contract concerning personal property not existing in *solido* at the time of the contract, but which the vendor is to manufacture or put in condition for delivery, such as the woodwork for a wagon, or wheat not yet threshed, or nails to be made from iron belonging to the manufacturer, and the like, is not within the statute. *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187; *Downs v. Ross*, 23 Wend. 270; *Sewall v. Fitch*, 8 Cow. 215; *Parsons v. Louck*, 48 N. Y. 17, 8 Am. Rep. 517; *Cooke v. Millard*,

65 N. Y. 352, 22 Am. Rep. 619; *Higgins v. Murray*, 73 N. Y. 252. But this rule seems to be peculiar to that state.

By the Massachusetts rule the test is not the existence or nonexistence of the commodity at the time of the contract, as in New York, or whether the contract will ultimately result in the transfer of the title of a chattel from the vendor to the vendee, as in England, but whether the article is such as the manufacturer ordinarily produces in the course of business, and for the trade, or as the result of a special order, and for special purposes. If the former, it is regarded as a contract of sale, and within the statute. If the latter, it is held to be essentially a contract for labor and material, and therefore not within the statute. Thus, it is held that an agreement to build a carriage of a certain design is not within the statute (*Mixer v. Howarth*, 21 Pick. 205, 32 Am. Dec. 256), but that a contract to buy a certain number of boxes of candles at a fixed price, which the vendor said he would thereafter finish and deliver, is a contract of sale, to which the statute applies. *Gardner v. Joy*, 9 Metc. 177. The result of the decisions in that state has recently been stated thus: "A contract for the sale of articles then existing, or such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute." Ames, J., in *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112. And this doctrine seems to be the one most widely adopted in this country.

As to the latter part of the rule, relating to goods made on special orders, there is little if any conflict in the American cases. *Baker, Sales*, § 96; 2 *Schouler, Pers. Prop.* § 443; *Browne, St. Frauds*, § 308; 8 *Am. & Eng. Enc. Law*, 707; note to *Flynn v. Dougherty*, 14 L. R. A. 230; *Meincke v. Falk*, 55 Wis. 427, 13 N. W. 545, 42 Am. Rep. 722; *Finney v. Apgar*, 31 N. J. Law, 266; *Phipps v. McFarlane*, 3 Minn. 109 (Gil. 61), 74 Am. Dec. 743; *Hight v. Ripley*, 19 Me. 137; *Cason v. Cheely*, 6 Ga. 554; *Abbott v. Gilchrist*, 38 Me. 260. Until legislation shall assert itself more positively, the courts are put to their election as between these three rules, which, though each has its own merits, are not to be reconciled with one another. In the absence of a statute substantially the same as Lord Tenterden's act, we are unwilling to go to the extent of the doctrine of *Lee v. Griffin*; and in this case it is unnecessary for us to give a preference to either the New York or Massachusetts rule, because the contract in question is valid under either. It would be excluded from the operation of the statute by the rule adopted in New York, because the subject-matter of the contract did not exist in *solido*, or at all, at the time it was made; and it is not within the statute under the Massachusetts rule and the generally

accepted American doctrine, because the ironwork was to be manufactured especially for the defendant, and upon his special order, according to a particular design, and was not such as the plaintiffs, in the ordinary course of their business, manufactured for the general trade.

It follows that under either view the court below was in error in holding that the contract was void because not in writing. The judgment must therefore be reversed, and a new trial ordered.

2. ACCEPTANCE AND RECEIPT

KEMENSKY v. CHAPIN et al.

(Supreme Judicial Court of Massachusetts, 1907. 193 Mass. 500,
79 N. E. 781, 9 Ann. Cas. 1168.)

Action by one Kemensky against one Chapin and others. Judgment for defendants, and plaintiff excepts.

BRALEY, J. Independently of Rev. Laws, c. 74, § 5, which makes unenforceable a contract for the sale of goods for \$50 or more where there is neither a memorandum in writing nor a partial payment of the price, unless the purchaser receives and accepts a part of the goods sold, it became a question of fact whether the onions which the plaintiff delivered corresponded in size and quality with those shown by the sample. *Townsend v. Hargraves*, 118 Mass. 325, 332; *McLean v. Richardson*, 127 Mass. 339; *Obery v. Lander*, 179 Mass. 131, 60 N. E. 378.

But if upon this issue the verdict might have been in his favor, as the statute of frauds had been pleaded, the plaintiff, before he could recover, was obliged to offer some evidence which tended to show an acceptance by the defendants. *Snow v. Warner*, 10 Metc. 132, 137, 138, 43 Am. Dec. 417; *Davis v. Eastman*, 1 Allen, 422; *Goddard v. Binney*, 115 Mass. 450, 456, 15 Am. Rep. 112; *Safford v. McDonough*, 120 Mass. 290. His argument that this proof was unnecessary as the correspondence prior to delivery, when taken in connection with the shipping receipt, constituted a sufficient memorandum to satisfy the statute, fails, because these papers are silent as to the essential element of price. *Waterman v. Meigs*, 4 Cush. 497; *Smith v. Colby*, 136 Mass. 562.

By the terms of sale, which for the purposes of these exceptions must be taken as stated by the plaintiff, although the delivery to the railroad company selected by them was a delivery to the defendants, yet as the carrier was authorized only to receive the onions for transportation

there was no express or implied authority conferred to accept, and under such conditions mere delivery does not constitute an acceptance. *Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 545; *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47. Compare *Strong v. Dodds*, 47 Vt. 348.

In *Remick v. Sandford*, 120 Mass. 309, 316, it is said: "If the buyer accepts the goods as those which he purchased, he may afterwards reject them if they are not what they were warranted to be, but the statute is satisfied." See, also, *Frostburg Mining Co. v. New England Glass Co.*, 9 Cush. 115. If there was a transfer of possession not only to the carrier, but subsequently by the actual receipt of the car and its contents by the defendants at their place of business, this transfer cannot be treated as constituting an acceptance; which means an assent by the buyer as owner to take, in whole or in part, the merchandise delivered as being that for which he bargained. To determine this question the ordinary test is whether the conduct of the buyer in dealing with the goods is such as fairly to indicate an assertion of ownership, and where the sale is upon an express or implied warranty an examination at the time of delivery, and nothing more, is insufficient. *Remick v. Sandford*, *ubi supra*.

Under the terms of sale the parties contemplated that at some period the defendants should have an opportunity to ascertain if in bulk the onions corresponded with those shown in the sample. Upon the arrival of the car this right was exercised, but the examination being for this specific purpose could not be deemed an act of acceptance. *Remick v. Sandford*, *ubi supra*; *Taylor v. Smith*, L. R. 2 Q. B. 65, 71 (1893). See, also, *Devine v. Warner*, 75 Conn. 375, 380, 53 Atl. 782, 96 Am. St. Rep. 211; *Lloyd v. Wright*, 25 Ga. 215; *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Hewes v. Jordan*, 39 Md. 472, 17 Am. Rep. 578; *Maxwell v. Brown*, 39 Me. 98, 63 Am. Dec. 605; *Edwards v. Grand Trunk R. R.*, 48 Me. 379, 381; *Smith v. Brennan*, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722; *Clark v. Labreche*, 63 N. H. 397; *Shindler v. Houston*, 1 N. Y. 261, 269, 49 Am. Dec. 316; *Stone v. Browning*, 51 N. Y. 211; *Id.*, 68 N. Y. 598; *Cooke v. Millard*, 65 N. Y. 368, 22 Am. Rep. 619; *Gibbs v. Benjamin*, 45 Vt. 124; *Hill v. McDonald*, 17 Wis. 97, 100; *Bacon v. Eccles*, 43 Wis. 227, 237; *Browne*, Statute of Frauds (5th Ed.) § 316, a-c; *Benjamin on Sales* (5th Ed.) 214.

After examination the defendants declined to accept, and immediately notified the plaintiff by letter stating their reasons, and while the jury could have found that in fact these reasons were unfounded, such a finding would have been inconclusive, as under the statute the buyer is at liberty to refuse, even if his action could be found to have been arbitrary and wholly unreasonable.

The defendants acted solely within their rights, even if all the bags

were opened for the purpose of inspecting the contents of each, as in no other satisfactory way could a comparison be made between the sample and the consignment received. Up to this point, therefore, there had been no assumption of ownership sufficient to satisfy the statute. *Knight v. Mann*, 118 Mass. 143; *Remick v. Sandford*, *ubi supra*. By directing the transfer of the car to the general yard of the railroad, after their notice to the plaintiff they did not exercise any dominion as owners over its contents, as they were only taking the steps usually required to indicate positively that they declined to accept and that thereafter the onions were subject to the plaintiff's disposal. *Atherton v. Newhall*, *ubi supra*. *Dorr v. Fisher*, 1 Cush. 271, 279; *Douglass Axe Mfg. Co. v. Gardner*, 10 Cush. 88, 90; *Cox v. Wiley*, 183 Mass. 410, 412, 67 N. E. 367.

The case appears to be one of peculiar hardship to the plaintiff, but as the unequivocal acts of the defendants are insufficient to show acceptance, a verdict in their favor was rightly ordered. *Remick v. Sandford*, 120 Mass. 309; *Knight v. Mann*, 118 Mass. 143; *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47; *Denny v. Williams*, 5 Allen, 1; *Howard v. Borden*, 13 Allen, 299, 300; *Stone v. Browning*, 51 N. Y. 211; *Id.*, 68 N. Y. 598. Exceptions overruled.

CONSIDERATION

I. Consideration Defined ¹

HAMER v. SIDWAY.

(Court of Appeals of New York, 1891. 124 N. Y. 538, 27 N. E. 256,
12 L. R. A. 463, 21 Am. St. Rep. 693.)

Appeal from an order of the general term of the supreme court in the fourth judicial department, reversing a judgment entered on the decision of the court at special term in the county clerk's office of Chemung county on the 1st day of October, 1889. The plaintiff presented a claim to the executor of William E. Story, Sr., for \$5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of \$5,000. The nephew assented thereto, and fully performed the conditions inducing the promise.

PARKER, J.² (after stating the facts as above.) The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of \$5,000. The trial court found as a fact that "on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of \$5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

¹ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 61, 62.

² The statement of facts is abridged and a portion of the opinion omitted.

The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefited, the contract was without consideration,—a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement.

Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson, Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. *444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent, Comm. (12th Ed.) *465. Pollock in his work on Contracts, (page 166,) after citing the definition given by the exchequer chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense.

Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken. In

Shadwell v. Shadwell, 9 C. B. (N. S.) 159, an uncle wrote to his nephew as follows: "My dear Lancey: I am so glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require. Your affectionate uncle, Charles Shadwell." It was held that the promise was binding, and made upon good consideration. In *Lakota v. Newton*, (an unreported case in the superior court of Worcester, Mass.,) the complaint averred defendant's promise that "if you [meaning the plaintiff] will leave off drinking for a year I will give you \$100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred, on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled. In *Talbott v. Stemmons*, 89 Ky. 222, 12 S. W. 297, 5 L. R. A. 856, 25 Am. St. Rep. 531, the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson Albert R. Talbott \$500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the surrender of that right caused the promise, and, having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes*, 60 Mo. 249, 21 Am. Rep. 395.

The cases cited by the defendant on this question are not in point. In *Mallory v. Gillett*, 21 N. Y. 412, *Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 476, and *Berry v. Brown*, 107 N. Y. 659, 14 N. E. 289, the promise was in contravention of that provision of the statute of frauds which declares void all promises to answer for the debts of third persons unless reduced to writing. In *Beaumont v. Reeve*, Shir. Lead. Cas. 7, and *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329, the question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In

Duvoll v. Wilson, 9 Barb. 487, and Wilbur v. Warren, 104 N. Y. 192, 10 N. E. 263, the proposition involved was whether an executory covenant against incumbrances in a deed given in consideration of natural love and affection could be enforced. In Vanderbilt v. Schreyer, 91 N. Y. 392, the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guaranty its payment, which was done. It was held that the guaranty could not be enforced for want of consideration; for in building the house the plaintiff only did that which he had contracted to do. And in Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224, the court simply held that "the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." * * *

II. Necessity for Consideration *

See Rann v. Hughes, *supra*, page 34.

III. Adequacy of Consideration *

SCHNELL v. NELL.

(Supreme Court of Indiana, 1861. 17 Ind. 29, 79 Am. Dec. 453.)

PERKINS, J. Action by J. B. Nell against Zacharias Schnell, upon the following instrument:

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion county, state of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks county, state of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: Whereas his wife, Theresa Schnell, now deceased, has made a last will and testament in which, among other provisions, it was ordained that every one of the above-named second parties, should receive the sum of \$200; and whereas the said provisions of the will must remain a nullity, for the reason

* For discussion of principles, see Clark on Contracts (2d Ed.) § 63.

* For discussion of principles, see Clark on Contracts (2d Ed.) §§ 65, 66.

that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this, and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: \$200 to the said J. B. Nell; \$200 to the said Wendelin Lorenz; and \$200 to the said Donata Lorenz, in the following installments, viz., \$200 in one year from the date of these presents; \$200 in two years; and \$200 in three years; to be divided between the parties in equal portions of \$66 $\frac{2}{3}$ each year, or as they may agree, till each one has received his full sum of \$200. And the said parties of the second part, for, and in consideration of this, agree to pay the above named sum of money (one cent), and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased. In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals. Zacharias Schnell. [Seal.- J. B. Nell. [Seal.] Wen. Lorenz. [Seal.]]"

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid, had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig. p. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay \$600:

(1) A promise, on the part of the plaintiffs, to pay him one cent.

(2) The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of the property.

(3) The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. *Baker v. Roberts*, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps, for other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one. *Hardesty v. Smith*, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig. p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. *Spahr v. Hollingshead*, 8 Blackf. 415.

There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: (1) They are past considerations. Ind. Dig. p. 13. (2) The fact that Schnell loved his wife, and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell and the Lorenzes a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the person named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife, a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action.

The demurrer to the answer should have been overruled. See *Stevenson v. Druley*, 4 Ind. 519.

PER CURIAM. The judgment is reversed, with costs. Cause remanded, etc.

IV. Sufficiency or Reality of Consideration ⁵

1. MUTUAL PROMISES—VOLUNTARY SUBSCRIPTIONS

BEATTY'S ESTATE v. WESTERN COLLEGE OF TOLEDO, IOWA.

(Supreme Court of Illinois, 1898. 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242.)

In the matter of the estate of Mary Beatty, deceased, the Western College of Toledo obtained a judgment against Jacob Miller and another, executors, and they appealed to the appellate court, which affirmed the judgment (71 Ill. App. 587), and they again appeal.

* * *

The note, filed as a claim against the estate of the deceased, is as follows:

"\$7,000.00. Dover, Ill., Dec. 9, 1887. In consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition, I promise to pay to the order of the treasurer of Western College, of Toledo, Iowa, for the erection of the Ladies' Boarding Hall of said college, on or before the first day of December, 1910, the sum of seven thousand dollars, without interest: provided, that in the event of my death before the maturity of this note it shall become then due. Mary Beatty. P. O.: Dover. County: Bureau. State: Ill. Witness: H. H. Maynard. W. M. Beardshear." * * *

The appellee is a college located at Toledo, in the state of Iowa, and is under the management of the denomination known as the United Brethren in Christ. Prior to December, 1887, the college had commenced the erection of a building to be known as the "Ladies' Boarding Hall" of the college, and had expended upon the stone foundation thereof the sum of \$2,000, donated to it by a man in Ohio, named Dodds. In December, 1887, representatives of the college appealed to the deceased, Mary Beatty, at her home in Dover, Ill., for a donation of \$10,000, to complete the erection of said hall, she being a member of the denomination to which the college belonged. On

⁵ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 68-73, 75-78, 80.

December 9, 1887, she was visited by H. H. Maynard, a soliciting agent of the college, and W. M. Beardshear, president of the college. On December 3, 1887, she had given to Maynard \$500 in cash, a note for \$1,500, payable on or before December 3, 1890, and a note for \$5,000 of like tenor with the note for \$7,000 above set forth. On December 9, 1887, she destroyed the \$5,000 note, and gave to Maynard and Beardshear the \$7,000 note above described, and also a short-time note for \$1,000. * * *

MAGRUDER, J.⁶ * * * It is contended, however, that the note for \$7,000, filed as a claim in this case, was executed and delivered without any valid consideration to support it. The note recites upon its face that the maker thereof promises to pay "in consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition." It is unnecessary to discuss the question whether this note, upon its face, imports a consideration or not. The general rule is that, when a note contains the words "for value received," the consideration is imported. *Meyers v. Phillips*, 72 Ill. 460. Whether this note, upon its face, imports a consideration or not, it is well settled that proof may be introduced to show the facts in regard to the consideration of the note. The evidence tends to show that the deceased availed herself of the privilege, specified in the note, of sending one student four years free of tuition. The certificate embodying such privilege was issued to Mrs. Beatty, and was made use of by a female student upon the order of Mrs. Beatty.

We do not deem it necessary, however, to decide whether or not the privilege specified upon the face of the note, and the use of it made by the deceased, constituted a valid consideration. The proof tends to show that the note for \$7,000 was a gift or donation to the college. Such a note partakes of the nature of a voluntary subscription to raise a fund or promote an object. It is well settled that a promissory note without consideration, and intended as a gift to the payee by the maker thereof, is but a promise to make a gift in the future, and is not enforceable. As a gift it is always revocable until it is executed, and is not executed until it is paid. "The promise stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon." *Pratt v. Trustees*, 93 Ill. 475, 34 Am. Rep. 187. In *Blanchard v. Williamson*, 70 Ill. 647, 652, we said: "If a party delivers his own promissory note as a gift, it is but a promise to pay a sum certain at a future day, and we are not aware such a promise can be enforced, either at law or in equity. It could not be enforced against the maker in his lifetime, and his representatives could defend against it on the ground there was no consideration." *Shaw*

⁶ The statement of facts is abridged and a portion of the opinion omitted. The title of this case in 52 N. E. 432, 42 L. R. A. 797, is *Miller v. Western College*.

v. Camp, *supra* [160 Ill. 425, 43 N. E. 608]; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463; *Richardson v. Richardson*, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305; *Pope v. Dodson*, 58 Ill. 360.

But, while such a note, amounting to a mere gift, is open to the defense of a want of consideration, yet that defense cannot be made to it if money has been expended, or liabilities have been incurred, in reliance upon the note. If money has been expended, or liabilities have been incurred, which, by legal necessity, must cause loss or injury to the person so expending money or incurring liability, if the note is not paid, the donor or maker thereof is, in good conscience, bound to pay; and the gift will be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking. We have said: "It is the expending of money, etc., or incurring a legal liability on the faith of the promise, which gives the right of action; and without this there is no right of action." *Pratt v. Trustees*, 93 Ill. 475, 34 Am. Rep. 187; *Beach v. Church*, 96 Ill. 177; *Hudson v. Seminary Corp.*, 113 Ill. 618.

In *Simpson Centenary College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74, the supreme court of Iowa said: "Where a note, however, is based on a promise to give for the support of the objects referred to [founding a school, church, or other institution of similar character], it may still be open to this defense [want of consideration], unless it shall appear that the donee has, prior to any revocation, entered into engagements or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor should be estopped from pleading want of consideration." *Wesleyan Seminary v. Fisher*, 4 Mich. 515; *Amherst Academy v. Cowls*, 6 Pick. 427, 17 Am. Dec. 387; *Roberts v. Cobb*, 103 N. Y. 600, 9 N. E. 500; *Johnson v. Wabash College*, 2 Ind. 555; *Roche v. Roanoke Classical Seminary*, 56 Ind. 198; *Simpson Centenary College v. Bryan*, 50 Iowa, 293; *Vierling v. Horton*, 27 Ill. App. 263; *Pryor v. Cain*, 25 Ill. 292; *Methodist Episcopal Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286.

There was evidence in the case at bar tending to show that the appellee expended money in the construction of the building known as "Ladies' Boarding Hall" upon the faith of the promise made by the deceased as embodied in the note for \$7,000. It is true that the money represented by the three certificates was all, or nearly all, used in the construction of the building. But the contract for the construction of it was let in the latter part of July, 1888, and the erection of the building was begun about August 1, 1888. This was some months prior to the gift of the \$3,500 represented by the first certificate, dated November 16, 1888. The correspondence introduced in evidence, and the statements of many of the witnesses, show that the contract was let, and the work upon the building was begun and prosecuted, with the expectation that the deceased would advance

money upon the note for \$7,000. It makes no difference that she did not advance any money upon that note, but preferred to donate \$6,700, and take back certificates, which secured to her the payment of annuities thereon during her life.

The instructions given by the court to the jury required them to find whether or not the college, during the lifetime of Mary Beatty, entered into a contract to build and erect, and did build and erect, and expend moneys and incur liabilities in building and erecting, the Ladies' Boarding Hall on the faith and strength of the note for \$7,000. The question as to the expenditure of such moneys and the incurring of such liabilities upon the faith and strength of the note was a question of fact, which was submitted to the jury by the instructions. The judgment of the circuit court in favor of appellee, and the judgment of the appellate court affirming the judgment of the circuit court, are final determinations of this question of fact, so far as we are concerned. In the present state of the record, we are obliged to assume that the jury found in favor of such expenditures of money and the incurring of such liabilities on the part of the appellee. This being so, the appellee is entitled to its right of action, even if the note for \$7,000 was without consideration before it was thus acted upon.

Upon this branch of the case, therefore, we are of the opinion that the courts below committed no error in holding the claim of appellee to be a valid claim. * * * Judgment affirmed.

2. FORBEARANCE TO EXERCISE A RIGHT

SMITH v. FARRA.

(Supreme Court of Oregon, 1891. 21 Or. 395, 28 Pac. 241, 20 L. R. A. 115.)

Action by Cyrus Smith against G. R. Farra and D. B. Montieth on an agreement of compromise. Judgment for plaintiff. Farra appeals.

The other facts fully appear in the following statement by Bean, J.:

This is an action to recover \$700 on an agreement of compromise between plaintiff and the defendant, Farra. The facts are these:

On July 24, 1888, defendant, Farra, and one Montieth, for \$305 cash, sold and conveyed by deed containing covenants of title and warranty, lots 7 and 8 in block 4, in West Yaquina, Benton county, Or., to plaintiff. In August, 1890, Farra, discovering that he and Montieth did not own the property sold to plaintiff, wrote him the following letter: "Corvallis, Oregon, Aug. 7th, 1890. Mr. Cyrus Smith, Amity, Or.—Dear Sir: The men who have been engaged in getting up an abstract of Benton county have made a discovery that we sold you two lots—Nos. 7 and 8, in block 4, in West Yaquina—that had been sold and

deeded before to Mr. W. P. Keady. We would like you to select two other lots in or near those, or even in some other portion, of about the same value, and we will deed them to you. Yours, respectfully, G. R. Farra."

To this letter plaintiff replied as follows: "Amity, Oregon, Aug. 11th, 1890. Dr. G. R. Farra—Dear Sir: Your letter of the 7th inst. is at hand, and in reply will say I was very much surprised to hear that Mr. Keady had a deed made prior to mine to the lots in West Yaquina that you had deeded to me. I was also a little diverted at the idea that you should say, 'The lots Mr. Buford sold you,' when the record shows that you and Mr. Montieth sold me the lots, and Mr. Buford not known in the transaction. I have had those lots in a real-estate man's hands for some time. He has been instructed by me to sell the two for one thousand dollars, and nothing less. I have been offered eight hundred dollars for them, and refused it. I have taken counsel in the matter, and have been told that beyond a doubt I could recover from you and Mr. Montieth all the damage it is to me, but, as I am averse to law-suits, I had much rather settle the matter ourselves, providing I can do so without too much loss. Please write me how it happened that you deeded those lots to me after you had deeded them to Mr. Keady. In regard to taking other lots in place of them, I would do so, providing I could get what I consider a fair deal. I know every foot of that ground, and, excepting about six lots, I would rather have those lots than any other two lots in West Yaquina. Please send me a plat of West Yaquina, marking all the lots sold. Also make me an offer of what you propose to do, and oblige, yours truly, Cyrus Smith."

Several others letters of both parties appear in the record, which are unnecessary to be set out here, but which show an honest, bona fide attempt on the part of each to arrive at some satisfactory settlement of the controversy, but, without being able to do so, until September 8, 1890, when plaintiff wrote to defendant the following letter: "Amity, Sept. 8th, 1890. Dr. G. R. Farra—Dear Sir: Yours in answer to my inquiry as to your least cash price on certain lots in West Yaquina came to hand over a week ago, but not before I had informed you that I did not want them at any price. For some reason I have received no answer to my last letter to you, written Aug. 30th. I now write to inform you that something must be done. We have talked this matter over enough to come to some conclusion. I want it understood that I refuse to take the lots you have offered me for those I bought of you, and I presume you will not contend that I am under any obligation to do so. I merely want you and Mr. Montieth to perfect my title to the lots I bought of you, or I want you to pay me eight hundred dollars. I think I am very reasonable in this offer. In fact you have indirectly offered me that, for you have offered me two lots that you valued at \$350 each, and \$100, which is exactly \$800. I am aware that you would rather dispose of the lots than come out with the money, which I presume is the reason you don't give me my

choice to take the money or the lots. But the lots I bought of you I bought for a particular purpose, and the lots you have offered me won't fill that purpose in any sense, owing to the lay of the land. In fact I would rather have the lots I bought of you than lots 1 and 2 immediately in front of them. Please let me know immediately your final conclusion. Yours, truly, Cyrus Smith."

To this letter Farra replied as follows: "Corvallis, Oregon, Sept. 22, 1890. Mr. Cyrus Smith, Amity, Or.—Dear Sir: Your last has been to hand for quite a while, but I have been conferring with others of the company to know what best to do. We have decided that we made you a fair proposition on your lots, and more than the lots can be sold for to-day, and more than you can collect for them if carried into litigation. We will make you one more proposition: We will give you, as stated in one of my letters, two lots in block 3, facing as yours face, and one hundred dollars, (\$100,) or we will give you seven hundred dollars in cash. If this is not satisfactory, you can proceed to collect your damages by law. Yours, respectfully, G. R. Farra."

Upon receipt of this letter plaintiff wrote, accepting the cash offer of \$700, as follows: Amity, Sept. 24, 1890. Dr. G. R. Farra, Corvallis, Or.—Dear Sir: Yours of the 22d was received yesterday, and in reply will say in justice I believe I am entitled to eight hundred dollars, but I can't afford to go into litigation for one hundred dollars. Therefore I accept your offer of seven hundred dollars, and on receipt of the money I will relinquish all my claims on you and Mr. Montieth for lots seven and eight in block 4 of West Yaquina. Send check on the bank, and I will receipt you for it. Yours, truly, Cyrus Smith."

Defendant having refused to comply with his agreement and pay the \$700, this action was brought. The trial in the court below resulted in a verdict and judgment in favor of the plaintiff, from which defendant appeals.

BEAN, J. (after stating the facts.) The only question presented on this record is the validity of the agreement of compromise between plaintiff and defendant under the facts heretofore stated. The contention of defendant is that for a breach of the covenant of title contained in his deed to plaintiff the law fixes the measure of damages at the purchase price and interest, and that, therefore, the claim of plaintiff was a fixed and liquidated one, and in no sense such a doubtful claim as will support an agreement of compromise. Upon this record it must be conceded that plaintiff had a valid cause of action against defendant for a breach of the covenants of the deed upon which he could have successfully maintained legal proceedings, and that both parties in their negotiations for a settlement, in good faith, believed that the measure of damages was the actual value of the property conveyed at the time the negotiations took place, and not the consideration and interest; and, in order to avoid litigation, and compromise the matter in dispute between them, the agreement sued on

was made. Both parties were acting in the utmost good faith, with equal knowledge of the facts, and plaintiff had reasonable ground to think, for he had taken legal advice on the question, that his damages amounted to \$800, and intended in good faith to assert his claim, but to avoid litigation he forebore to do so, on account of defendant's promise to pay him \$700, preferring to accept that amount rather than go into litigation, and defendant preferring to pay that sum rather than to suffer the consequences of a lawsuit. That there was an actual, bona fide dispute between these parties as to the amount of plaintiff's damages, which each in good faith believed to be doubtful, and that the settlement was intended, in good faith, as a compromise of such dispute, is not open to question on this record.

But it is now insisted that the dispute was about a matter not in fact doubtful, although the parties so considered it, and therefore the agreement of compromise is without consideration. The law favors voluntary settlements of controversies between the parties, which are characterized by good faith and a full disclosure of all the facts. *Wells v. Neff*, 14 Or. 66, 12 Pac. 84, 88. And such settlements will be upheld and enforced, although the disposition made by the parties in their agreement may not be what the court would have adjudged had the controversy been brought before it for decision. Nor need the dispute to have been about a claim or matter actually doubtful. If the parties bona fide, and on reasonable grounds, believed it to be doubtful, it is a sufficient consideration to support the compromise. "If the requisites of good faith exist," says Mr. Pomeroy, "it is not necessary that the dispute should be concerning a question really doubtful, if the parties bona fide consider it so. It is enough that there is a question between them to be settled by their compromise." *Pom. Eq. Jur.* § 850. And "no investigation into the character or value of the different claims submitted," says Mr. Parsons, "will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a dispute between them." 1 *Pars. Cont.* (7th Ed.) 439.

It is not every disputed claim, however, which will support a compromise, but it must be a claim honestly and in good faith asserted, concerning which the parties may bona fide and upon reasonable grounds disagree. The compromise of such a claim in good faith is a good consideration to pay money in settlement thereof, and when an action is brought upon such promise it is no defense to say that the claim was not in fact a valid one, or that the parties were mistaken either as to the law or the facts. *Stewart v. Ahrenfeldt*, 4 Denio (N. Y.) 189; *Crans v. Hunter*, 28 N. Y. 389; *White v. Hoyt*, 73 N. Y. 505; *Griswold v. Wright*, 61 Wis. 195, 21 N. W. 44; *Brooks v. Hall*, 36 Kan. 697, 14 Pac. 236; *Flannagan v. Kilcome*, 58 N. H. 443; *Wehrum v. Kuhn*, 61 N. Y. 623. Nor is it a defense that the claim could not have been maintained if suit or action had been brought upon it, or that the parties were mistaken as to the law; for if it is,

then it would follow that contracts by the parties settling their own disputes would at least be made to stand or fall according to the opinion of the court as to how the law would have determined it. "If, therefore," says Logan, J., "the solemn compromise of the parties is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said that a compromise is an unavailing, idle act, which questions even the power of the parties to bind themselves." *Fisher v. May*, 2 Bibb (Ky.) 448, 5 Am. Dec. 626.

The settlement of a controversy is valid and binding, not because it is the settlement of a valid claim, but because it is the settlement of a controversy. And when such settlement is characterized by good faith the court will not look into the question of law or fact in dispute between the parties, and determine which is right. All that it needs to know is that there was a controversy between the parties, each claiming in good faith rights in himself against the other, and that such controversy has been settled. In *Cook v. Wright*, 1 Best & S. 559, it appeared from the evidence that defendant believed himself not liable on the demand of plaintiff; but he knew that plaintiff thought him liable, and would sue him if he did not pay, and, in order to avoid the expense and trouble of legal proceedings against him, agreed to compromise, and gave his note for the amount agreed on in compromise, and the question was whether a person who has given a note as a compromise of a claim honestly made upon him, and which, but for that compromise, would at once have been brought to a legal decision, can resist payment of the note on the ground that the original claim thus compromised might have been successfully resisted; and it was held he could not, Blackburn, J., saying: "The real consideration depends on the reality of the claim made and the bona fides of the compromise."

In *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449, the plaintiff claimed that certain moneys were due him from the government of Honduras, and was about to take proceedings to enforce payment, and, in consideration that the plaintiff would forbear taking such proceedings for an agreed time, the defendant promised to deliver to him certain debentures. In an action for a breach of the contract the plea was that at the time of making the contract no money was due the plaintiff from the government of Honduras. This plea was held bad on demurrer, Cockburn C. J. saying: "No doubt it must be taken that there was in fact no claim by the plaintiff against the Honduras government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that, if an agreement is made to compromise a disputed claim forbearance to sue in respect of that claim is a good consideration, and, whether proceedings to enforce the disputed claim have or have not been instituted, makes no difference."

In *Grandin v. Grandin*, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642, the plaintiff was an heir at law of the deceased, and in good faith filed objections to the probate of the will, and, in consideration of his withdrawing his objections and making no further opposition to the probate of the will, the defendant agreed to pay him \$300. In an action on this promise it was held that the compromise was valid and binding, although it ultimately appeared that the claim of the plaintiff was wholly unfounded.

In *Bellows v. Sowles*, 55 Vt. 391, 45 Am. Rep. 621, the facts are as in the case last above cited, except that the plaintiff had not instituted proceedings to contest the will, but was making arrangements to do so, and defendant promised to pay him \$5,000 if he would desist from such opposition to the will. In an action on the promise the court held that plaintiff was not bound to show that his ground of opposition to the will would have been sufficient to have defeated its probate. It was enough if he was able to show that he honestly thought he had good and reasonable ground for making the claim that the will, so far as it related to him, was the production of undue influence, and for that reason he honestly and in good faith intended to oppose its establishment. In some of the authorities it is said that, in order that a compromise may constitute a sufficient consideration to support an executory contract, the claim must be at least doubtful, and there must be colorable ground of dispute, and some legal or equitable foundation for the claim. *Anthony v. Boyd*, 15 R. I. 495, 8 Atl. 701, 10 Atl. 657; *Mortgage Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88.

This statement must be construed with reference to the facts of the particular case, and, when so read, will, we think, be found to mean nothing more than that the claim must be a serious one, honestly made, which the party asserting does not know is unsubstantial, but believes he has a fair chance of sustaining, or does not know facts to his knowledge unknown to the other party, which show his claim a bad one.

As a result from the authorities, we think a doubtful or disputed claim, sufficient to constitute a good consideration for an executory contract of compromise, is one honestly and in good faith asserted, arising from a state of facts upon which a cause of action can be predicated, with the reasonable belief on the part of the party asserting it that he has a fair chance of sustaining his claim, and concerning which an honest controversy may arise, although in fact the claim may be wholly unfounded.

In the case before us plaintiff not only had a cause of action, but an admitted right of action, growing out of the sale of the property and the execution and delivery of the deed, which he could have prosecuted to a successful issue, and upon the facts of which he honestly and in good faith believed his damages amounted to at least \$800. This question he intended to submit to judicial decision. It was a question concerning which there could be and actually was an honest controversy. The proposition of settlement came from defendant, and the

compromise was effected after weeks of negotiation, at his solicitation. He had as full and complete knowledge of all the facts as the plaintiff, and presumably more so. By the compromise, and on the faith of defendant's promise, plaintiff forebore to assert his claim in the courts, and gave up a portion of what he believed to be a valid claim, and defendant, instead of being annoyed with an action, escaped the vexations incident thereto, although other motives may have prompted him to make the proposition of settlement; and this is a sufficient consideration to support defendant's promise. This is so, although it may now be clear that plaintiff could only have recovered in an action the consideration by him paid for the property, and that his claim for \$800 was in law wholly unfounded.

The defendant cannot escape liability on his solemn contract, entered into at his request and solicitation, by now showing or claiming that he was mistaken as to the law. It is sufficient for us to know that there was a dispute between the parties, and that it has been in the utmost good faith settled. Whether it was entirely the desire to avoid litigation, or what appeared to him some sufficient consideration, that induced the defendant to make the offer of settlement accepted by plaintiff, is unnecessary for us to inquire. It is enough that with full knowledge of all the facts, and without any fraud or concealment on the part of plaintiff, the offer was made and accepted. Nor is it necessary for plaintiff to show that the law would have awarded him the damages claimed. It is enough if he had an honest, reasonable ground to think his damages amounted to \$800, and intended in good faith to assert it, and forebore to do so on account of defendant's promise. Conceding, therefore, that the measure of damages growing out of the sale of the property and execution and delivery of the deed from defendant to plaintiff is the purchase price and interest,—a question, however, we are not called upon to determine,—the compromise between plaintiff and defendant was supported by a sufficient consideration, and is valid and binding. Judgment of court below affirmed.

STRAHAN, C. J., being pecuniarily interested in the result of this action, did not sit in this case, and took no part in this decision.

3. DOING WHAT ONE IS BOUND TO DO

(A) Additional Compensation

KING v. DULUTH, M. & N. RY. CO.

(Supreme Court of Minnesota, 1895. 61 Minn. 482, 63 N. W. 1105.)

Action by George R. King, as surviving partner of the late firm of Wolf & King, against the Duluth, Missabe & Northern Railway Com-

panty, on contract. From an order overruling a demurrer to the complaint, defendant appeals.

START, C. J. This is an action brought by the plaintiff, as surviving partner of the firm of Wolf & King, to recover a balance claimed to be due for the construction of a portion of the defendant's line of railway. The complaint alleges two supposed causes of action, to each of which the defendant demurred on the ground that neither states facts constituting a cause of action. From an order overruling the demurrer the defendant appealed.

1. The complaint for a first cause of action alleges, among other things, substantially, that in January, 1893, the firm of Wolf & King entered into three written contracts with the president and representative of the defendant for the grading, clearing, grubbing, and construction of the roadbed of its railway for a certain stipulated price for each of the general items of work and labor to be performed; that the firm entered upon the performance of such contracts, but in the latter part of February, 1893, in the course of such performance, unforeseen difficulties of construction involving unexpected expenses, and such as were not anticipated by the parties to the contracts, were encountered. That the firm of Wolf & King found that by reason of such difficulties it would be impossible to complete the contracts within the time agreed upon without employing an additional and an unusual force of men and means, and at a loss of not less than \$40,000 to them, and consequently they notified the representative of the defendant that they would be unable to go forward with the contracts, and unable to complete or prosecute the work. Thereupon such representative entered into an agreement with them modifying the written contracts, whereby he agreed that if they would "go forward and prosecute the said work of construction, and complete said contract," he would pay or cause to be paid to them an additional consideration therefor, up to the full extent of the cost of the work, so that they should not be compelled to do the work at a loss to themselves; that in consideration of such promise they agreed to forward the work rapidly, and force the same to completion, in the manner provided in the specifications for such work, and referred to in such contracts. That in reliance upon the agreement modifying the former contracts, and in reliance upon such former contracts, they did prosecute and complete the work in accordance with the contracts as so modified by the oral agreement, to the satisfaction of all parties in interest. That such contracts and the oral contract modifying them were duly ratified by the defendant, and that the actual cost of such construction was not less than \$30,000 in excess of the stipulated amount provided for in the original written contracts.

It is claimed by appellant that the complaint shows no consideration for the alleged promise to pay extra compensation for the work; that it is at best simply a promise to pay the contractors an additional compensation if they would do that which they were already legally bound

to do. The general rule is that a promise of a party to a contract to do, or the doing of, that which he is already under a legal obligation to do by the terms of the contract is not a valid consideration to support the promise of the other party to pay an additional compensation for such performance. 1 Chit. Cont. 60; Pol. Cont. 176; Leake, Cont. 621. In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration. The following cases sustain and illustrate the practical application of the rule. *Ayres v. Railroad Co.*, 52 Iowa, 478, 3 N. W. 522; *McCarty v. Association*, 61 Iowa, 287, 16 N. W. 114; *Lingenfelder v. Brewing Co.*, 103 Mo. 578, 15 S. W. 844; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328; *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224; *Wimer v. Worth Tp.*, 104 Pa. 317. If the allegations of the complaint, when taken together, are in legal effect simply that the contractors, finding by the test of experience in the prosecution of the work that they had agreed to do that which involved a greater expenditure of money than they calculated upon, that they had made a losing contract, and thereupon notified the opposite party that they were unable to proceed with the work, and he promised them extra compensation if they would perform their contract, the case is within the rule stated, and the demurrer ought to have been sustained as to the first cause of action.

It is claimed, however, by the respondent, that such is not the proper construction of the complaint, and that its allegations bring the case within the rule adopted in several states, and at least approved in our own, to the effect that if one party to a contract refuses to perform his part of it unless promised some further pay or benefit than the contract provides, and such promise is made by the other party, it is supported by a valid consideration, for the making of the new promise shows a rescission of the original contract and the substitution of another. In other words, that the party, by refusing to perform his contract, thereby subjects himself to an action for damages, and the opposite party has his election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise; and if he does so it is a relinquishment of the original contract and the substitution of a new one. *Munroe v. Perkins*, 9 Pick. (Mass.) 305, 20 Am. Dec. 475; *Bryant v. Lord*, 19 Minn. 396 (Gil. 342); *Moore v. Locomotive Works*, 14 Mich. 266; *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122.

The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and

thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement, is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby.

There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration.

A party cannot lay the foundation of an estoppel by his own wrong. If it be conceded that by the new promise the party obtains that which he could not compel, viz. a specific performance of the contract by the other party, still the fact remains that the one party has obtained thereby only that which he was legally entitled to receive, and the other party has done only that which he was legally bound to do. How, then, can it be said that the legal rights or obligations of the party are changed by the new promise? It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration.

In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract

are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit. 1 Whart. Cont. § 500.

On the other hand, where no unforeseen additional burdens have been cast upon a party refusing to perform his contract, which make his refusal to perform, unless promised further pay, equitable, and such refusal and promise of extra pay are all one transaction, the promise of further compensation is without consideration, and the case falls within the general rule, and the promise cannot be legally enforced, although the other party has completed his contract in reliance upon it. This proposition, in our opinion, is correct on principle and supported by the weight of authority. What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient.

The cases of *Meech v. City of Buffalo*, 29 N. Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and *Michaud v. McGregor* (decided at the present term) 61 Minn. 198, 63 N. W. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule.

Do the allegations of fact contained in plaintiff's first alleged cause of action bring his case within the exception? Clearly not; for eliminating all conclusions, and considering only the facts alleged, there is nothing to make the case exceptional, other than the general statement that the season was so extraordinary that in order to do the stipulated work it would require great and unusual expense, involving a large use of powder and extra time and labor for the purpose of blasting out the frozen earth and other material which was encountered.

What the character of this material was we are not told, or what the other extraordinary conditions of the ground were. The court will take judicial knowledge of the fact that frozen ground on the Missabe Range, where the work was to be performed, in the month of February, is not unusual or extraordinary. It was a matter which must have been anticipated by the parties, and taken into consideration by them when this contract was made.

The most that can be claimed from the allegations of the complaint is that the contractors had made a losing bargain, and refused to complete their contract, and the defendant, by its representative, promised them that if they would go forward and complete their contract it would pay them an additional compensation, so that the total compensation should be equal to the actual cost of the work.

2. The second cause of action is supported by a different and a valid consideration. It fairly appears from the allegations of the complaint as to this cause of action that the defendant, by changing its line and by its defaults, had so far delayed the work of construction as to legally excuse the contractors from their obligation to complete the work within the time originally agreed upon, and that to execute the work within such time would involve an additional expense. Thereupon, in consideration of their waiving the defaults and the delays occasioned by the defendant, and promising to complete the work in time, so that it could secure the bonds, it promised to pay or give to them the extra compensation. This was a legal consideration for such promise, and the allegations of the second general subdivision of the complaint state a cause of action.

So much of the order appealed from as overruled the defendant's demurrer to the supposed first cause of action in the plaintiff's complaint must be reversed, and as to so much of it as overruled the demurrer to the second cause of action it must be affirmed, and the case remanded to the district court of the county of St. Louis with the direction to modify the order appealed from so as to sustain the demurrer as to the first cause of action, with or without leave to the plaintiff to amend, as such court may deem to be just. So ordered.

(B) Part Payment in Satisfaction of Debt

JAFFRAY et al. v. DAVIS et al.

(Court of Appeals of New York. 1891. 124 N. Y. 164, 26 N. E. 351,
11 L. R. A. 710.)

POTTER, J. The facts found by the trial court in this case were agreed upon. They are simple, and present a familiar question of law. The facts are that defendants were owing plaintiffs, on the 8th

day of December, 1886, for goods sold between that date and the May previous, at an agreed price, the sum of \$7,714.37, and that, on the 27th of the same December, the defendants delivered to the plaintiffs their three promissory notes, amounting, in the aggregate, to \$3,462.-24, secured by a chattel mortgage on the stock, fixtures, and other property of defendants, located in East Saginaw, Mich., which said notes and chattel mortgage were received by plaintiffs, under an agreement to accept same, in full satisfaction and discharge of said indebtedness; that said notes have all been paid, and said mortgage discharged of record. The question of law arising from these facts, and presented to this court for its determination, is whether such agreement, with full performance, constitutes a bar to this action, which was brought after such performance to recover the balance of such indebtedness over the sum so secured and paid.

One of the elements embraced in the question presented upon this appeal is, viz., whether the payment of a sum less than the amount of a liquidated debt, under an agreement to accept the same in satisfaction of such debt, forms a bar to the recovery of the balance of the debt. This single question was presented to the English court in 1602, when it was resolved, if not decided, in *Pinnel's Case*, 5 Coke, 117, "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole," and that this is so, although it was agreed that such payment should satisfy the whole. This simple question has since arisen in the English courts, and in the courts of this country, in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed upon any recurrence of the question to criticise and condemn its reasonableness, justice, fairness, or honesty. No respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in *Pinnel Case*, *supra*, and *Cumber v. Wane*, 1 Strange, 426; *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Goddard v. O'Brien*, (Q. B. Div.) 21 Amer. Law Reg. 637, and notes.

The steadfast adhesion to this doctrine by the courts, in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business, and more extensive mercantile dealings and operations, demonstrate the force of the doctrine of *stare decisis*. But the doctrine of *stare decisis* is further illustrated by the course of judicial decisions upon this subject; for, while the courts still hold to the doctrine of the *Pinnel* and *Cumber-Wane Cases*, *supra*, they have seemed to seize with avidity upon any consideration to support the agreement to accept the lesser sum in satisfaction of the larger, or, in other words, to extract, if possible, from the circumstances of each case, a consideration for the new agreement, and to substitute the new agreement in place of the old, and thus to form a defense to the action brought upon the old agreement. It will serve the purpose of illustrating the ad

hesion of the court to settled law, and at the same time enable us, perhaps more satisfactorily, to decide whether there was a good consideration to support the agreement in this case, to refer to (the consideration in) a few of the numerous cases which the courts have held to be sufficient to support the new agreement.

Lord Blackburn said, in his opinion in *Foakes v. Beer*, *supra*, and while maintaining the doctrine, "that a lesser sum cannot be a satisfaction of a greater sum," "but the gift of a horse, hawk, or robe, etc., in satisfaction, is good," quite regardless of the amount of the debt; and it was further said by him, in the same opinion, "that payment and acceptance of a parcel before the day of payment of a larger sum would be a good satisfaction in regard to the circumstance of time;" "and so, if I am bound in twenty pounds to pay you ten pounds at Westminster, and you request me to pay you five pounds at the day, at York, and you will accept it in full satisfaction for the whole ten pounds, is it a good satisfaction?"

It was held in *Goddard v. O'Brien*, 9 Q. B. Div. 37: "A., being indebted to B. in 125 pounds 7s. and 9d. for goods sold and delivered, gave B. a check (negotiable, I suppose) for 100 pounds, payable on demand, which B. accepted in satisfaction,—was a good satisfaction." *Huddleston, B.*, in *Goddard v. O'Brien*, *supra*, approved the language of the opinion in *Sibree v. Tripp*, 15 Mees. & W. 26: "That a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount; the circumstance of negotiability making it in fact a different thing, and more advantageous, than the original debt, which was not negotiable."

It was held in *Bull v. Bull*, 43 Conn. 455: "And, although the claim is a money demand, liquidated, and not doubtful, and it cannot be satisfied with a smaller sum of money, yet, if any other personal property is received in satisfaction, it will be good, no matter what the value." And it was held, in *Cumber v. Wane*, *supra*, that a creditor can never bind himself by simple agreement to accept a smaller sum in lieu of an ascertained debt of a larger amount, such agreement being nudum pactum, but, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.

It was held in *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469, and in *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247, that "giving further security for part of a debt, or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction;" that, "if a debtor gives his creditor a note indorsed by a third party for a less sum than the debt, (no matter how much less,) but in full satisfaction of the debt, and it is received as such, the transaction constitutes a good accord and satisfaction." *Varney v. Conery*, 77 Me. 527, 1 Atl. 683.

And so it has been held "where, by mode or time of part payment, different than that provided for in the contract, a new benefit is or

may be conferred, or a burden imposed, a new consideration arises out of the transaction, and gives validity to the agreement of the creditor." *Rose v. Hall*, 26 Conn. 392, 68 Am. Dec. 402. And so "payment of less than the whole debt, if made before it is due, or at a different place from that stipulated, if received in full, is a good satisfaction." *Jones v. Bullitt*, 2 Litt. (Ky.) 49; *Ricketts v. Hall*, 2 Bush (Ky.) 249; *Smith v. Brown*, 10 N. C. 580; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136; *Schweider v. Lang*, 29 Minn. 254, 12 N. W. 33, 43 Am. Rep. 202.

In *Watson v. Elliott*, 57 N. H. 511-513, it was held: "It is enough that something substantial which one party is not bound by law to do is done by him, or something which he has a right to do he abstains from doing, at the request of the other party, is held a good satisfaction."

It has been held in a number of cases that, if a note be surrendered by the payee to the maker, the whole claim is discharged and no action can afterwards be maintained on such instrument for the unpaid balance. *Ellsworth v. Fogg*, 35 Vt. 355; *Kent v. Reynolds*, 8 Hun, 559. It has been held that a partial payment made to another, though at the creditor's instance and request, is a good discharge of the whole debt. *Harper v. Graham*, 20 Ohio, 106. "The reason of the rule is that the debtor in such case has done something more than he was originally bound to do, or, at least, something different. It may be more, or it may be less, as a matter of fact."

It was held by the supreme court of Pennsylvania in *Bank v. Huston*, 11 Wkly. Notes Cas. 389, (February 13, 1882:) The decided advantage which a creditor acquires by the receipt of a negotiable note for a part of his debt, as by the increased facilities of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, etc., was held to furnish ample reason why it should be a valid discharge of a larger account or open claim unnegotiable. It has been held that a payment in advance of the time, if agreed to, is a full satisfaction for a larger claim not yet due. *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; *Bowker v. Childs*, 3 Allen (Mass.) 434.

In some states, notably Maine and Georgia, the legislature, in order to avoid the harshness of the rule under consideration, have, by statute, changed the law upon that subject, by providing: "No action can be maintained upon a demand which has been canceled by the receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration, however small." Citing *Weymouth v. Babcock*, 42 Me. 42. And so in *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181, where a debt of \$820 upon book-account was satisfied by the payment of one dollar by calling the balance a "gift," though the balance was not delivered, except by fiction, and the receipt was in the usual form, and was silent upon the subject of a gift, and this case was followed and referred to in *Ferry v. Stepn-*

ens, 66 N. Y. 321. So it was held in *Mitchell v. Wheaton*, 46 Conn. 315, 33 Am. Rep. 24, that the debtor's agreement to pay, and the payment of \$150, with the costs of the suit, upon a liquidated debt of \$299, satisfied the principal debt.

These cases show in a striking manner the extreme ingenuity and assiduity which the courts have exercised to avoid the operation of the "rigid and rather unreasonable rule of the 'old law,'" as it is characterized in *Johnson v. Brannan*, 5 Johns. 268-272; or as it is called in *Kellogg v. Richards*, 14 Wend. 116, "technical and not very well supported by reason;" or, as may be more practically stated, a rule that "a bar of gold worth \$100 will discharge a debt of \$500, while 400 gold dollars in current coin will not." See note to *Goddard v. O'Brien*, supra, in 21 Amer. Law Reg. 640, 641.

The state of the law upon this subject, under the modification of later decisions, both in England and in this country, would seem to be as expressed in *Goddard v. O'Brien*, supra: "The doctrine in *Cumber v. Wane*, is no doubt very much qualified by *Sibree v. Tripp*, and I cannot find it better stated than in 1 Smith, Lead. Cas. (7th Ed.) 595: 'The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been ingrafted on it, may perhaps be summed up as follows, viz.: That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being nudum pactum. But, if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement.'" *Bull v. Bull*, 43 Conn. 455; *Fisher v. May*, 2 Bibb (Ky.) 449, 5 Am. Dec. 626; *Reed v. Bartlett*, 19 Pick. (Mass.) 273; *Bank v. Geary*, 5 Pet. 99-114, 8 L. Ed. 60; *Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469; *Boyd v. Hitchcock*, 20 Johns. 76, 11 Am. Dec. 247; *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; *Jones v. Perkins*, 29 Miss. 139-141, 64 Am. Dec. 136; *Hall v. Smith*, 15 Iowa, 584; *Babcock v. Hawkins*, 23 Vt. 561.

In the case at bar, the defendants gave their promissory notes upon time for one-half the debt they owed plaintiff, and also gave plaintiff a chattel mortgage on the stock, fixtures, and other personal property of the defendants, under an agreement with plaintiff to accept the same in full satisfaction and discharge of said indebtedness. Defendants paid the notes as they became due, and plaintiff then discharged the mortgage. Under the cases above cited, and upon principle, this new agreement was supported by a sufficient consideration to make it a valid agreement, and this agreement was, by the parties, substituted in place of the former. The consideration of the new agreement was that the plaintiff, in place of an open book-account for goods sold, got the defendants' promissory notes, probably negotiable in form, signed by defendants, thus saving the plaintiff perhaps trouble or expense of proving their account, and got security upon all the

defendants' personal property for the payment of the sum specified in the notes, where before they had no security. It was some trouble at least, and perhaps some expense to the defendants to execute and deliver the security, and they deprived themselves of the legal ownership, or of any exemptions, or the power of disposing of this property, and gave the plaintiff such ownership, as against the defendants, and the claims thereto of defendants' creditors, if there were any.

It seems to me upon principle, and the decisions of this state, (save perhaps *Keeler v. Salisbury*, 33 N. Y. 653, and *Platts v. Walrath*, *Lalor's Supp.* 59, which I will notice further on,) and of quite all of the other states, the transactions between the plaintiff and the defendants constitute a bar to this action. All that is necessary to produce satisfaction of the former agreement is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in the opinion of Judge Andrews, in *Allison v. Abendroth*, 108 N. Y. 470, 15 N. E. 606, from which I quote: "But it is held that, where there is an independent consideration, or the creditor receives any benefit, or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled, except for the agreement, then the agreement is not nudum pactum, and the doctrine of the common law, to which we have adverted, has no application."

Upon this distinction the cases rest, which hold that the acceptance by the creditor in discharge of the debt of a different thing from that contracted to be paid, although of much less pecuniary value or amount, is a good satisfaction, as, for example, a negotiable instrument binding the debtor and a third person for a smaller sum. *Curler v. Clark*, 3 Exch. 375. Following the same principle, it is held that, when the debtor enters into a new contract with the creditor to do something which he was not bound to do by the original contract, the new contract is a good accord and satisfaction, if so agreed. The case of accepting the sole liability of one of two joint debtors or copartners, in satisfaction of the joint or copartnership debt, is an illustration. This is held to be a good satisfaction, because the sole liability of one of two debtors "may be more beneficial than the joint liability of both, either in respect of the solvency of the parties, or the convenience of the remedy." *Thompson v. Percival*, 5 Barn. & Adol. 925. In perfect accord with this principle is the recent case in this court of *Ludington v. Bell*, 77 N. Y. 138, 33 Am. Rep. 601, in which it was held that the acceptance by a creditor of the individual note of one of the members of a copartnership after dissolution, for a portion of the copartnership debt, was a good consideration for the creditor's agreement to discharge the maker from further liability. *Pardee v. Wood*, 8 Hun, 584; *Douglass v. White*, 3 Barb. Ch. 621-624.

Notwithstanding these later and decisive authorities, the plaintiff contends that the giving of the defendants' notes, with the chattel mortgage security and the payment, was an insufficient consideration

to support the new or substituted agreement, and cites, as authority for such contention, the cases of *Platts v. Walrath*, *Lalor's Sup.* 59, and *Keeler v. Salisbury*, 33 N. Y. 648. *Platts v. Walrath* arose in justice court, and the debt in controversy was put forth as a set-off. The remarks of the judge in the former case were quite obiter, for there were various subjects in dispute upon the trial, and from which the justice might have reached the conclusion that he did. The judge, in the opinion relied upon, says: "Looking at the loose and secondary character of the evidence as stated in the return, it was, perhaps, a question of fact whether any mortgage at all was given, or at least, whether, if given, it was not in terms a mere collateral security for the large note." "Even the mortgage was left to parol proof. Did it refer to, and profess to be a security for, the note of \$1,500, or that sum less the fifty dollars agreed to be thrown off?" etc.

There is so much confusion and uncertainty in the case that it was not thought advisable to publish the case in the regular series of Reports. The case of *Keeler v. Salisbury*, *supra*, is not to be regarded as an authority upon this question, or as approving the case of *Platts v. Walrath*, *supra*. In the case of *Keeler v. Salisbury*, the debtor's wife had joined in the mortgage given by her husband, the debtor, to effect the compromise, thus releasing her inchoate right of dower. The court held that fact constituted a sufficient consideration to support the new agreement, though the court, in the course of the opinion, remarked that it had been held that the debtor's mortgage would not be sufficient, and referred to *Platts v. Walrath*. But the court did not otherwise indicate any approval of that case, and there was no occasion to do so, for, as before stated, the court put its decision upon the fact that the wife had joined in the mortgage.

In view of the peculiar facts in these two cases, and the numerous decisions of this and other courts hereinbefore referred to, I do not regard them as authorities against the defendants' contention that the plaintiff's action for the balance of the original debt is barred by reason of the accord and satisfaction, and the judgment must be reversed, with costs. All concur.

4. IMPOSSIBILITY AND VAGUENESS

HART v. GEORGIA R. CO.

(Supreme Court of Georgia, 1897. 101 Ga. 188, 28 S. E. 637.)

Action by Eva F. Hart against the Georgia Railroad Company. A general demurrer to the complaint was sustained, and plaintiff brings error.

COBB, J. Mrs. Hart sued the Georgia Railroad Company, alleging in her petition that the defendant was engaged as a common carrier in the carrying of passengers, and that an eating station for the comfort and convenience of passengers on the road was practically a necessity, and the establishment of such a station would be a great advantage to the road in increasing its popularity and patronage; that the company, through its duly-authorized agent and officer, covenanted and agreed with her that, if she would erect at the station of Union Point a permanent and first-class eating house for the accommodation of the traveling public, and maintain the same in a first-class manner, it, by the patronage of its road, would maintain and support the same. In consideration of such representations and promises, and of the profits anticipated from the patronage, she agreed to erect such a house, and maintain or cause it to be maintained in first-class style, promising further to accommodate the employes of said company thereat for a reduced price, to wit, 25 cents for meals, being one-half the regular price. It was further alleged that in accordance with the terms of the agreement a first-class hotel was erected and maintained, and that the contract was fully performed on her part. It was also alleged that said company discontinued stopping its trains for meals at Union Point until only one train was stopped for that purpose, the patronage of which was not sufficient to make the business of maintaining an eating house profitable; that the business was wholly dependent for support upon the patronage of the trains of the company, and could not be otherwise sustained; and since the stopping of the trains she is unable to conduct the business at all, and has lost the entire profits which could have been derived therefrom, to the net annual value of \$4,000. To the declaration the defendant filed a general demurrer, which was sustained, and the plaintiff excepted.

The contract as declared on contained an obligation on the part of the plaintiff to erect "a permanent and first-class hotel for the accommodation of the traveling public, and maintain the same in a first-class manner," and the obligation on the part of the road that it, "by the patronage of its road, would maintain and support the same." The whole of the alleged parol contract is contained in the words quoted. What is a first-class hotel? How is a hotel maintained in a first-class manner? What is the patronage of a road running trains day and night at a given point? Is the stopping of every train necessary to maintain and support an eating house at such point? If not, how many trains, and what trains? Suppose the plaintiff had failed to erect an hotel, what character of building could she have been compelled to erect under this contract? That she did erect an hotel which, in her opinion, was a first-class hotel, and that she did maintain the same in what she understood to be a first-class manner, cannot make certain and definite stipulations in the contract declared on, which are otherwise vague and indefinite. Construing the declaration as a whole, it is impossible to determine with certainty what was the contract

between the parties, and therefore it is impossible to determine what would be the damages arising from a failure to carry out the alleged contract.

As the language alleged does not make a contract between the parties which is capable of enforcement, there was no error in dismissing the declaration on demurrer. Judgment affirmed.

5. CONSIDERATION IN RESPECT OF TIME—PAST CONSIDERATION

(A) General Rule

MOORE v. ELMER et al.

(Supreme Judicial Court of Massachusetts, 1901. 180 Mass. 15, 61 N. E. 259.)

Bill by Josephine L. Moore against Nelson L. Elmer and others, as administrators, etc. Case reported, and bill dismissed.

The following is a copy of the contract sued on: "Springfield, Mass., Jan. 11th, 1898. In Consideration of Business and Test Sitings Reseived from Mme. Sesemore, the Clairvoyant, otherwise known as Mrs. Josephene L. Moore on Numerous occasions I the undersighned do hearby agree to give the above naned Josephene or her heirs, if she is not alive, the Balance of her Mortgage note whitch is the Herman E. Bogardus Mortgage note of Jan. 5. 1893, and the Interest on sane on or after the last day of Jan. 1900, if my Death occurs before then whitch she has this day Predicted and Claims to be the truth, and whitch I the undersighned Strongly doubt. Wherein if she is right I am willing to make a Recompense to her as above stated, but not payable unless death Occurs before 1900. Willard Elmer."

HOLMES, C. J. It is hard to take any view of the supposed contract in which, if it were made upon consideration it would not be a wager. But there was no consideration. The bill alleges no debt of Elmer to the plaintiff prior to the making of the writing. It alleges only that the plaintiff gave him sittings at his request. This may or may not have been upon an understanding or implication that he was to pay for them. If there was such an understanding it should have been alleged or the liability of Elmer in some way shown. If, as we must assume and as the writing seems to imply, there was no such understanding, the consideration was executed and would not support a promise made at a later time. The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for.

See Langd. Cas. Cont. § 92 et seq.; Chamberlin v. Whitford, 102 Mass. 448, 450; Dearborn v. Bowman, 3 Metc. 155, 158; Johnson v. Kimball, 172 Mass. 398, 400, 52 N. E. 386.

It may be added that even if Elmer was under a previous liability to the plaintiff it is not alleged that the agreement sued upon was received in satisfaction of it, either absolutely or conditionally, and this again cannot be implied in favor of the plaintiff's bill. It is not necessary to consider what further difficulties there might be in the way of granting relief. Bill dismissed.

(B) Exceptions

(a) PAST CONSIDERATION GIVEN AT THE REQUEST OF PROMISOR

See Moore v. Elmer, *supra*, p. 128.

(b) REVIVAL OF UNENFORCEABLE AGREEMENT

DUSENBURY v. HOYT.

(Court of Appeals of New York, 1873. 53 N. Y. 521, 13 Am. Rep. 543.)

The action was upon a promissory note. The defendant pleaded his discharge in bankruptcy. Upon the trial, after proof of the discharge, plaintiff offered to prove subsequent promise of the defendant to pay the note. Defendant objected upon the ground that the action was upon the note, not upon the new promise. The court sustained the objection, and directed a verdict for defendant, which was rendered accordingly.⁷

ANDREWS, J. The 34th section of the bankrupt law declares that a discharge in bankruptcy releases the bankrupt from all debts provable under the act, and that it may be pleaded as a full and complete bar to all suits brought thereon.

The legal obligation of the bankrupt is by force of positive law discharged, and the remedy of the creditor existing at the time the discharge was granted to recover his debt by suit is barred. But the debt is not paid by the discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law,

⁷ The statement of facts is abridged.

and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action. It was held in *Shippey v. Henderson*, 14 Johns. 178, 7 Am. Dec. 458, that it was proper for the plaintiff, when the bankrupt had promised to pay the debt after his discharge, to bring his action upon the original demand, and to reply the new promise in avoidance of the discharge set out in the plea. The court, following the English authorities, said that the replication of the new promise was not a departure from the declaration, but supported it by removing the bar interposed by the plea, and that in point of pleading it was like the cases where the defense of infancy or the statute of limitations was relied upon. The case of *Shippey v. Henderson* was followed in subsequent cases, and the doctrine declared in it became, prior to the Code, the settled law. *McNair v. Gilbert*, 3 Wend. 344; *Wait v. Morris*, 6 Wend. 394; *Fitzgerald v. Alexander*, 19 Wend. 402.

The question whether the new promise is the real cause of action and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defense which the discharge gives him against the original demand, has occasioned much diversity of judicial opinion. The former view was held by Marcy, J., in *Depuy v. Swart*, 3 Wend. 139, 20 Am. Dec. 673, and is probably the one best supported by authority. But, after as before the decision in that case, the court held that the original demand might be treated as the cause of action, and for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of opinion that the rule of pleading, so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required, the pleadings will not disclose the new promise, is equally applicable where a new promise is relied upon to avoid the defense of infancy or the statute of limitations, and in these cases the plaintiff may now, as before the Code, declare upon the original demand. *Es-selstyn v. Weeks*, 12 N. Y. 635.

The offer of the plaintiff to prove an unconditional promise by the defendant, after his discharge, to pay the debt, was improperly overruled, and the judgment should, for this reason, be reversed, and a new trial ordered, with costs to abide the event. All concur, except FOLGER, J., not voting. Judgment reversed.

CAPACITY OF PARTIES

I. Infants¹

1. IN GENERAL.

COLE v. PENNOYER.

(Supreme Court of Illinois, 1852. 14 Ill. 158.)

Cole commenced his action in ejectment to recover the west half of the northwest quarter of section twenty-four, in township thirteen north, range eleven west. Pennoyer pleaded not guilty. A trial was had before Woodson, Judge, a jury being waived, and judgment entered for Pennoyer as of May term, 1852, of the Morgan Circuit Court. A bill of exceptions was taken, which shows that the land in question was entered by and patented to Cole when he was about eighteen years old. His father, George Cole, was in possession of the land, and his son, the plaintiff in error, resided with him in 1833. In that year, the father sold the land to one Arthur, on a credit, and procured the plaintiff, then only nineteen years of age, to make a deed, and the father surrendered the possession of the land to Arthur. The land was never paid for. George Cole moved to Iowa, taking his son with him. Stephen Cole remained in Iowa and Missouri until 1840, when he was back in Illinois on a visit, until about two years before the commencement of this suit. Pennoyer proved that Arthur sold said land, and conveyed to one Masson, and gave him possession in 1836, and that said land was several times sold and regularly conveyed down to Pennoyer, and that Pennoyer and those under whom he claims, have been in actual possession of the land, and paid all taxes since 1839. That Stephen Cole became of age in June, 1835.

CATON, J. The question as to what contracts by an infant are absolutely void, or only voidable, is one upon which there has been a very considerable diversity of opinion in different courts. All agree that the implied contracts of an infant for necessities, are binding upon him, as in case of an adult, and all agree that the appointment of an attorney by an infant is absolutely void. The difficulty seems to have been in laying down a rule by which to determine satisfactorily what other contracts made by an infant are void, or merely voidable.

It was laid down by Lord Mansfield, in *Zouch v. Parsons*, 3 Burr. 1794, that all contracts which take effect by the delivery of the infant

¹ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 91-94, 95-97, 99-101, 105-107, 110, 111, 115, 116.

himself, are voidable, and not void; and that it is only such acts as take effect by the delivery of another for the infant, which are absolutely void. He denies the doctrine often asserted, that a lease by an infant reserving no rent, or the surrender of a lease without consideration, are void, as being manifestly prejudicial to his interests; and he says: "There is no instance where the other party to a deed can object on account of infancy. Consequently, the infant may let the surrender stand, or avoid it; which proves it to be voidable only." Not long after, in the case of *Keane v. Boycott*, 2 H. Black. 511, Eyre, Ch. J., laid it down as a rule, that those deeds which the court could see and pronounce to be prejudicial to the interests of the infant, were void; while those which were manifestly to the advantage of the infant, as for necessities, were binding, while all others were merely voidable, and might be confirmed or repudiated after he attains his majority.

This rule is approved by Chancellor Kent in his Commentaries, understanding, as he evidently does, that it does not conflict with the case of *Zouch v. Parsons*, for he says the doctrine of that case "has been recognized as law in this country, and is not now to be shaken. On the authority of that case, even the bond of an infant has been held to be voidable only, at his election. It is an equitable rule, and most for the benefit of the infant, that conveyances to and from himself, and his contracts, in most cases, should be considered to be voidable." 2 Kent, 236. Mr. Wallace, in a very learned note, where all the cases on the subject seem to be collected, says: "The numerous decisions which have been had in this country justify the settlement of the following definite rule, as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessities; the only act which he is under a legal incapacity to perform, is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable, by turn, at his election."

If literally understood, there are certainly serious objections to the rule, that the court must, in every case, inquire whether the deed is for the benefit or to the injury of the infant, and thence determine whether it is void or voidable. In such an inquiry, is the court to look alone to the face of the deed? or shall it inquire into the circumstances of the transaction? If the former, the court must often be misled, for it is frequently the case that a deed for the conveyance of land shows but very little of the true character of the transaction, its object being merely to transfer the legal title without a strict regard to the real inducements and considerations which moved the party to the conveyance. If the rule be established, that the face of the deed shall determine whether it was to the advantage or injury of the infant, such deeds will always be framed with a view to that, and will never fail to show an advantageous bargain for the minor. There are serious objections, also, to requiring the court to hear evidence showing the circumstances

of the sale, and thence determine the question of benefit or injury. In the first place, it would interrupt the regular progress of the trial, by a collateral inquiry about facts which when ascertained might induce one to think the bargain advantageous, while another would think it ruinous to the interest of the infant. But in determining these questions, a certain regard must be had to the interests of the public,—of those who may wish to purchase the estate. A subsequent purchaser finding a regular chain of title may be required to ascertain whether those through whose hands the title has passed, were capable of making an obligatory conveyance, and if he finds any of them are infants, take his chance of a subsequent ratification of the conveyance; but to require him to ascertain all the circumstances of the bargain, and from these to judge at his peril what the opinion of courts might be of its beneficial character, would leave the common assurances of the country in quite too uncertain a condition. It is far better, in our judgments, to hold all conveyances made by infants in person voidable only, to be confirmed or repudiated by them as they may choose, after they arrive at years of legal discretion. A review of the authorities on this subject, would show that this rule has been generally, if not universally adopted, and it is certainly most to the advantage of the infant, while it least subserves the public interests. *Lester v. Fraser*, Riley, Eq. (S. C.) 76; *Kline v. Beebe*, 6 Conn. 499; *Drake v. Ramsay*, 5 Ohio, 251; *Freeman v. Bradford*, 5 Port. (Ala.) 270; *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *Bool v. Mix*, 17 Wend. (N. Y.) 120, 31 Am. Dec. 285; *Gillett v. Stanley*, 1 Hill (N. Y.) 122.

Were a deed to be held to be void, it would be binding upon neither party. The adult party might repudiate it as well as the infant; whereas, if held to be voidable only, the adult would be bound by it, leaving it optional with the infant, after he attains his majority, to ratify it or not. With this option it cannot prejudice his interest. He is left to claim the benefit of the bargain if a good one, or to reject it if he has been overreached or imposed upon in his infancy. We have no hesitation in holding in this case, that the deed made by the plaintiff during his minority was voidable, but not void. He had a right to revoke it within a reasonable time after he became of age. There are various modes in which the grantor after he becomes of age may disaffirm a conveyance made during his minority, one of which is by bringing an action of ejectment for the premises conveyed, as was done in this case. But this should, no doubt, be done within a reasonable time. Within what time the party should disaffirm the act or be considered to have approved it, it is unnecessary to determine, at least so far as the conveyance of real estate is concerned, for we have a statute which has settled that question in this case.

The eighth section of the twenty-fourth chapter of the Revised Statutes provides as follows: "Every person in the actual possession of lands or tenements under claim and color of title, made in good faith,

and who shall for seven successive years continue in such possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise, or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to continue the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section." The ninth section prescribes the rule as to vacant and unoccupied land; and the tenth section exempts from the operation of two preceding sections certain lands in which the public have an interest, and proceeds: "Nor shall they extend to lands or tenements when there shall be an adverse title to said land or tenements, and the holder of such adverse title is under the age of twenty-one years, insane, imprisoned, feme covert, out of the limits of the United States, and in the employment of the United States, or of this State: Provided, such person shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after such disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment."

Whether a void deed would constitute such claim and color of title as is contemplated in this statute, it is not necessary for us now to inquire: that a deed which binds the grantee, and actually conveys the legal title, and which can only be defeated by some affirmative act, by the grantor or his representatives disaffirming it, and which to all the rest of the world is good and valid for all purposes, does constitute such claim and color of title, we cannot doubt. Should this be held not within the provisions of the statute, it would be difficult to find one that would, short of an absolute and indefeasible title. It was to quiet possessions held in good faith, but under defective titles, that this statute was passed, and not to give security to those who were already secure. The bill of exceptions in this case shows that the plaintiff executed the deed in question in 1833, and that in 1835, he became twenty-one years of age, and after the lapse of sixteen years, he commenced this action for the first time, so far as we know, claiming the title in opposition to his deed. Arthur, the immediate grantor of the plaintiff, took possession of the land. From him, the title was regularly transferred to the defendant in this action, through several mesne conveyances, which were all regularly acknowledged and recorded; and those under whom he claims, have had the actual and continued possession, and have paid all taxes due thereon since 1839, a period of twelve years immediately antecedent to the commencement of this action. During all of his time, and for the four previous years, the plaintiff had been of age, and legally capable of asserting his rights, had he chosen to do so; while the statute requires that he should have asserted them within three

years after his disability was removed. It is true, that this statute has been passed since he attained his majority, but the defendant has held possession, and paid the taxes more than seven years since its passage, and this entitles him to the benefit of the statute.

The judgment of the circuit court is affirmed. Judgment affirmed.

2. LIABILITY FOR NECESSARIES

McKANNA et al. v. MERRY.

(Supreme Court of Illinois, 1871. 61 Ill. 177.)

THORNTON, J. In 1864, Kate Feehan, since intermarried with McKanna, accompanied appellee and wife on a trip from Illinois to California, by water. Her passage money was paid by appellee. Kate was then an infant, and under the control of her guardian, who was desirous that she should attend school for another year, and disapproved of the trip.

The only proof as to the value of her estate is that it consisted of an undivided one-third of some realty, which, after her marriage, and a few years after the advancement of the money, was sold for \$3250.

There is no proof that this trip was necessary for her health, or that it subserved any purpose other than pleasure, or as company for the wife of appellee.

The court gave for appellee the following instruction: "What are necessities depends upon the circumstances of the case. If the going of defendant, Kate, to California was prudent and proper, under the circumstances proved, and the plaintiff advanced money necessary to take her there, and the same was for her benefit, then it is for the jury to determine whether such advances of money were for necessities."

There is no positive rule by means of which it may be determined what are and what are not necessities. Whether articles are of a class or kind for which infants are liable, or whether certain subjects of expenditure are necessities, are to be judged of by the court. Whether they come within the particular class, and are suitable to the condition and estate of the infant, is to be determined by the jury as matter of fact. For example, suppose this trip had been to Europe, involving, in time, several years, and an expenditure of thousands of dollars, would any court hesitate to decide that the money thus advanced did not constitute necessities? Chit. Cont. 141a, note 2; 1

Pars. Cont. 296; *Beeler v. Young*, 1 Bibb (Ky.) 519; 1 Am. Lead. Cas. 248.

The court, in the instruction, merely informed the jury that if the trip was prudent and proper, and that the money was for her benefit, then the jury must determine whether such advances of money were for necessities. There was not a particle of proof to enable the jury to determine as to the propriety or impropriety, the prudence or imprudence, of the trip, or that the advancement of the money was for the benefit of appellant.

Even if there had been such proof, the instruction was wrong. The court should have defined necessities in some manner. Blackstone defines necessities to be "necessary meat, drink, apparel, physic," and says that an infant may bind himself to pay "for his good teaching and instruction, whereby he may profit himself afterwards." The articles furnished, or money advanced, must be actually necessary, in the particular case, for use, not mere ornament; for substantial good, not mere pleasure; and must belong to the class which the law generally pronounces necessary for infants.

The courts have generally excluded from the term "necessaries" horses, saddles, bridles, pistols, liquors, fiddles, chronometers, etc. It has been held, however, that if riding on horseback was necessary to the health of the infant, the rule was different.

We have been referred to no case, and, after a thorough examination, have found none, in which it has been held that moneys advanced for traveling expenses, under the circumstances of this case, were necessities.

The court should have instructed the jury as to the classes and general description of articles for which an infant is bound to pay. Then the jury must determine whether they fall within any of the classes, and whether they are actually necessary and suitable to the estate and condition of the infant.

It may be proper to advert to another principle. The infant had a guardian, who had charge and management of her estate, which consisted entirely of realty. It was the duty of the guardian to superintend the education and nurture of his ward, and apply to such purpose, first, the rents and profits of the estate, and next the interest upon the ward's money. This is the positive command of the statute, and he was liable upon his bond for noncompliance. He was the judge of what were necessities for his ward, if he acted in good faith.

A third party had no right to intervene and usurp the rights and duties of the guardian. Even if the money paid was, in some sense, for the infant's benefit, and the trip was prudent and proper, yet, if the guardian, in good faith, and in the exercise of a wise discretion, and with reference to the best interests of his ward, supplied her wants and contributed means suitable to her age and station in life, and in view of her estate, then the infant would not be liable for the money

as necessities. *Beeler v. Young*, supra; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419, 22 Am. Dec. 652; *Guthrie v. Murphy*, 4 Watts (Pa.) 80, 28 Am. Dec. 681; *Wailing v. Toll*, 9 Johns. (N. Y.) 141.

We express no opinion as to the weight of the evidence, for the reason that there must be a new trial.

The judgment is reversed for the errors indicated, and the cause remanded. Judgment reversed.

3. RATIFICATION AND AVOIDANCE

(A) Who may Avoid Contract

MANSFIELD v. GORDON.

(Supreme Judicial Court of Massachusetts, 1887. 144 Mass. 168,
10 N. E. 773.)

Bill in equity to set aside a mortgage made by one Burrell, insolvent debtor, while a minor. Trial in the superior court upon issues framed for a jury, which found that the mortgagor, Burrell, was a minor, under 21 years of age, when he executed the mortgage; that he did not at the time represent to the defendant that he was 21 years of age; and that neither he nor plaintiff ratified or affirmed said mortgage after Burrell became 21 years of age, or waived the objection of his minority. After further hearing in said court before Barker, J., the bill was dismissed, and the plaintiff appealed. Other facts appear in the opinion.

DEVENS, J. The plaintiff by his bill seeks to relieve the realty of Burrell, an insolvent debtor, of whose estate he is assignee, from the incumbrance of a mortgage thereon conditioned for the payment of a note of \$1,000. The note and mortgage were executed by Burrell when under age. He is now of age, and was so when the plaintiff was appointed assignee. Since his majority, he has not ratified the note and mortgage, nor is it alleged that he has done any act in disaffirmance thereof. The assignment vests in the assignee not only all the property of the debtor, both real and personal, which he could lawfully have sold, assigned, or conveyed, including debts due him and the securities therefor, but also "all his rights of action for goods or estate, real or personal." "By the right of action mentioned in the statute," it is said by Chief Justice Shaw, "the legislature intended all valuable rights actually subsisting, whether absolute or conditional, legal or equitable, which were to be obtained by the aid of any species of judicial process." *Gardner v. Hooper*, 3 Gray, 404.

It is the contention of the plaintiff that, by virtue of this clause, as assignee he is entitled to exercise the privilege which the insolvent might have exercised on reaching his majority, and disaffirm this mortgage, and thus is entitled to a decree relieving the estate therefrom. That an individual creditor cannot attach property conveyed by a debtor while a minor, the conveyance of which such debtor might have disaffirmed, and thus avail himself of the infant's privilege, is well settled. *McCarty v. Murray*, 3 Gray, 578; *Kendall v. Lawrence*, 22 Pick. 540; *Kingman v. Perkins*, 105 Mass. 111. While the rights of the assignee are not always tested by those of the individual creditor, there would seem to be no reason why larger rights in an estate conveyed by a minor are obtained by an assignee acting on behalf of all the creditors.

The contracts of an infant are voidable only, and not void, and it has often been said that the right to avoid his contracts is a personal privilege of the infant only, not to be availed of by others. *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Chandler v. Simmons*, 97 Mass. 508-511, 93 Am. Dec. 117; 1 Chit. Cont. (11th Ed.) note 6. It is said in *Austin v. Charlestown Fem. Sem.*, 8 Metc. 196-200, 41 Am. Dec. 497, by Judge Wilde: "Voidable acts by an infant, or matters of record done or suffered by him, can be avoided by none but himself, or his friends in blood, and not by privies in estate, and this right of avoidance is not assignable." *Bac. Abr.* "Infancy and Age," 1, 6; *Whittingham's Case*, 8 Coke, 43.

It is said that it is for the benefit of the debtor that the assignee should be allowed to avoid his mortgage, as the assets of the estate are thus increased. The ground upon which an infant is allowed to avoid his contracts is for personal benefit, and for protection against the improvidence which is the consequence of his youth. He may therefore avoid his contract without returning the consideration received, but it is not easy to see why his creditors, or the assignee as representing them, should have this right. It may well be that the estate of the insolvent has been augmented to that extent by the very sum of money which the minor received.

The fact that the infant may rescind without returning the consideration indicates that the right is strictly a personal privilege; and that, as the rule permitting him to thus avoid his contract is established solely for his protection, so he alone can have the benefit of it. Decree affirmed.

(B) *What Amounts to a Ratification*

THOMPSON et al. v. LAY et ux.

(Supreme Judicial Court of Massachusetts, 1826. 4 Pick. 48,
16 Am. Dec. 325.)

Assumpsit on the promise of the wife before marriage. The defendants pleaded the infancy of the wife. The plaintiffs replied a ratification after she became of age and before her marriage.

The plaintiff, to prove a ratification, produced evidence that the wife, after she was of age and before her marriage, acknowledged she owed the money on the note, and said that she had not the means of paying it then, but that she would pay it as soon as she had the means, or as soon as she should be able.

On this evidence the defendants agreed to be defaulted; but if it was insufficient to maintain the action, the default was to be taken off, and the plaintiffs were to become nonsuit.

PARKER, C. J., delivered the opinion of the court.

The authorities cited, especially the cases of *Whitney v. Dutch* [14 Mass. 457, 7 Am. Dec. 229] and *Ford v. Phillips* [1 Pick. 202], explicitly lay down the principle, that the promise of an infant cannot be revived, so as to sustain an action, unless there be an express confirmation or ratification after he comes of age.

Such a ratification may be proved in divers ways; but it cannot be inferred from a mere acknowledgment of debt, as in the cases on the statute of limitations. A promise to pay, is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise, as, if the party should say, after coming of age, *I do ratify and confirm, or, do agree to pay, the debt.*

But a ratification may be absolute or conditional. If it be the latter, the terms of the condition must have happened, or been complied with, before an action can be sustained. *I ratify and confirm my promise, provided I receive a certain legacy, or, if I succeed to a certain estate, or, if I recover a certain sum of money, or, if I draw a prize in a certain lottery,* would make a conditional promise or ratification, sufficient to make the defendant liable on a contract made when a minor, when the events happen, but not before. So an engagement or promise to pay when able, is a conditional promise, and the plaintiff, to avail himself of it, must give in evidence the ability of the defendant. It would not be necessary to show an ability to pay without inconvenience, but evidence that there is property from which the debt might be paid, or an income from some source which would enable the party to pay, would be sufficient.

The cases cited by the plaintiffs' counsel are bottomed upon this principle. That of *Martin v. Mayo* [10 Mass. 137, 6 Am. Dec. 103], is thought to be of a different description, but we understand the court to have there explicitly admitted the principle, but to have decided that the words appended to the promise did not constitute a condition, but merely postponed the time of payment. If there was any error, which, however, we do not perceive, it was not in the principle adopted, but in the construction of the words of the promise.

Plaintiffs nonsuit.

(C) *Return of Consideration*

LEMMON v. BEEMAN.

(Supreme Court of Ohio, 1888. 45 Ohio St. 505, 15 N. E. 476.)

William J. Beeman, the plaintiff below, sued the defendant, James F. Lemmon, as administrator, for money paid by him upon the purchase of a certain stock of drugs of James Lemmon, the defendant's decedent, the plaintiff being a minor at the time of the purchase, and having elected, on becoming of age, to rescind the contract. On the trial of the case, in the common pleas, the defendant excepted to a part of the charge of the court, and took a bill of exceptions, setting forth the evidence and the charge; to which exception was taken. The judgment was for the plaintiff, and was affirmed in the district court. The part of the charge to which exception was taken is to the effect that, upon the facts of the case, the plaintiff could recover without returning the property. The facts are stated in the opinion.

MINSHALL, J.² (after stating the facts as above.) In 1881, Beeman, then a minor, purchased of James Lemmon, then in life, but since deceased, a certain stock of drugs, for which he paid at the time \$400, the price as agreed on between them. The stock was in a store in the state of Illinois; and the sale was made by Lemmon, through his agent, Dr. Everett, who some time before had sold the stock to Lemmon, and, as his agent, had continued in possession of the property, and conducted the business for him. In a short time after the sale had been made to Beeman, the goods were taken from him under an execution issued upon a judgment against Everett, upon the claim of the creditor of the latter that they belonged to him, and not to Lemmon. Beeman made an effort to recover the property; and, in a short time after he became of age, (which was in 1882,) disaf-

² A portion of the opinion is omitted.

firmed the contract, presented a claim to the administrator of Lemmon's estate for the money he had paid on the purchase, and demanded its return; which was refused and the claim rejected.

No point is made as to the ownership of the goods; it is averred in the petition, and must be taken as the fact, that they belonged to the deceased at the time of the sale to Beeman. Again, there is no room for a claim, nor is it made, that the property purchased was in the nature of necessities, and the contract, for such reason, incapable of being disaffirmed; nor is it claimed that the decedent or his agent was in any way deceived as to the age of Beeman at the time the sale was made. The only question presented upon the record is whether, upon the facts as stated, the minor had the right, on becoming of age, to rescind the contract, and recover the consideration he had paid, without returning the property that had been sold and delivered to him. The true doctrine now seems to be that the contract of an infant is in no case absolutely void. 1 Pars. Cont. 295, 328; Pol. Cont. 36; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; *Williams v. Moor*, 11 Mees. & W. 256.

An infant may, as a general rule, disaffirm any contract into which he has entered; but, until he does so, the contract may be said to subsist, capable of being made absolute by affirmance, or void by disaffirmance, on his arriving at age; in other words, infancy confers a privilege rather than imposes a disability. Hence the disaffirmance of a contract by an infant, in the exercise of a right similar to that of rescission in the case of an adult, the ground being minority, independent of questions of fraud or mistake. But, in all else, the general doctrine of rescission is departed from no further than is necessary to preserve the grounds upon which the privilege is allowed; and is governed by the maxim that infancy is a shield, and not a sword. He is not in all cases, as is an adult, required to restore the opposite party to his former condition; for if he has lost or squandered the property received by him in the transaction that he rescinds, and so is unable to restore it, he may still disaffirm the contract and recover back the consideration paid by him without making restitution; for, if it were otherwise, his privilege would be of little avail as shield against the inexperience and improvidence of youth. But when the property rescinded by him from the adult is in his possession, or under his control, to permit him to rescind, without returning it, or offering to do so, would be to permit him to use his privilege as a sword, rather than as a shield.

This view is supported, not only by reason, but by the greater weight of authority. It was recognized and applied by this court in *Cresinger v. Welch*, 15 Ohio, 156, 45 Am. Dec. 565, decided in 1846. The following is the language used by Mr. Tyler on the subject: "If the contract has been executed by the adult, and the infant has the property or consideration received at the time he attains full age, and he

then repudiates the transaction, he must return such property or consideration, or its equivalent, to the adult party. If, however, the infant has wasted or squandered the property or consideration received during infancy, and on coming of age repudiates the transaction, the adult party is remediless." He then adds that "there are expressions of judges and text writers against this latter proposition, but," he says, "the weight of authority is in harmony with it, and is decidedly in accord with the general principles of law for the protection of infants." Tyler, Inf. (2d Ed.) 80, and cases cited by the author. See, also, the case of Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194, and the notes thereto of Mr. Ewell, in his *Leading Cases on Infancy and Coverture*, 119. After an exhaustive review of the cases, this author says: "The true doctrine, and the one supported by the weight of authority, (at least in the United States,) would seem to be that when an infant disaffirms his executed contract, after arriving at age, and seeks a recovery of the consideration moving from him, and where the specific consideration received by him remains in his hands, in specie, at the time of disaffirmance, and is capable of return, it must be returned by him; but if he has, during infancy, wasted, sold, or otherwise disposed of, or ceased to possess the consideration, and has none of it in his hands in kind on arriving at majority, he is not liable therefor, and may disaffirm without tendering or accounting for such consideration."

This statement of the law, supported, as it is, not only by the greater weight of authority, but also of reason, meets with our full approval. There is, however, much conflict in the decisions of the different states; greater perhaps than upon any other question connected with the law of infancy, (Metc. Cont. 76;) but we deem it unnecessary to attempt to review or discuss them, for the very good reason, that it has been done with thoroughness and ability by the authors just referred to. See, also, the notes of Mr. Ewell to the recent case of Adams v. Beall, decided by the Maryland court of appeals, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379.

We have been cited, by counsel for the defendant below, to a number of the previous decisions of this court, supposed to affect the right of the plaintiff to recover; but a careful examination will disclose that such is not the case. * * * It is apparent that none of these cases, when rightly considered, affect the right of the plaintiff to disaffirm the purchase made of the decedent, and to recover the consideration paid. Neither he, nor any one claiming under him, makes any claim to the property purchased.

By his disaffirmance, the title has been restored to the estate of the vendor, and the property, or its value, may be recovered by the administrator, if it was wrongfully taken by the sheriff under the execution against Everett. Judgment affirmed.

J
4. TORTS IN CONNECTION WITH CONTRACTS

RICE v. BOYER.

(Supreme Court of Indiana, 1886. 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53.)

ELLIOTT, C. J. It is alleged in the complaint of the appellant that the appellee, with intent to defraud the appellant, falsely and fraudulently represented that he was 21 years of age; that, relying on this representation, the appellant was induced to sell and deliver to the appellee, on one year's credit, a buggy and a set of harness; that the appellee, in payment for the property, delivered to appellant a buggy, and executed to him a promissory note, payable one year after date, and also executed a chattel mortgage to secure the payment of the note; that the appellee's representation was untrue; that he had not attained the age of 21 years; that, on account of appellee's nonage, the note cannot be enforced; that the appellee avoided his note and mortgage by a sale of the mortgaged property, and repudiates and refuses to be bound by his contract in reference thereto; that the appellant brings into court the note and mortgage executed to him, and tenders them to the appellee. Prayer for judgment for the value of the property delivered to appellee. To this complaint a demurrer was sustained, and error is assigned on that ruling.

The appellee's counsel defend the ruling principally upon the ground that the action was prematurely brought, inasmuch as it cannot be determined that any injury will be done the appellant until the expiration of the year fixed for the payment of the property purchased of the appellant. We agree with counsel that the contract is voidable, not void, and that the appellee might have performed it notwithstanding his nonage, if he had so elected. *Price v. Jennings*, 62 Ind. 111; *Board, etc., v. Anderson*, 63 Ind. 367, 30 Am. Rep. 224; *Shrock v. Crowl*, 83 Ind. 243.

But this principle is not broad enough to meet the averment of the complaint that the appellee has repudiated his contract, and refuses to be bound by it. As the authorities relied on by counsel do not fully cover the case, further investigation is necessary, and the first step in this investigation is to ascertain and declare the effect of the infant's repudiation of his contract.

In *Shrock v. Crowl*, *supra*, the holding in *Mustard v. Wohlford*, 15 Grat. (Va.) 329, 76 Am. Dec. 209, that, where a voidable act of an infant is disaffirmed, it avoids the contract ab initio, is fully approved. If this is the law, then, when the appellee repudiated his contract, he destroyed it for all purposes. It no longer bound him, nor could he take any benefit from it. If the contract was destroyed back to the

beginning, it ceased to be operative for anybody's benefit. We think the principle of law is correctly stated in the cases to which we have referred, and that the conclusion we have stated is the logical, and, indeed, inevitable, sequence of that principle. Tyler, Inf. 78.

An infant may repudiate a contract respecting personal property, during nonage. *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Manufacturing Co. v. Wilcox*, 59 Ind. 429; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Hoyt v. Wilkinson*, 57 Vt. 404; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Willis v. Twambly*, 13 Mass. 204; *Stafford v. Roof*, 9 Cow. (N. Y.) 628; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

The repudiation by the appellee was therefore a complete avoidance of the contract, effectually putting an end to its existence, both as to him, and as to the adult with whom he contracted.

It is evident, from what we have said, that the ground taken by the appellee's counsel is not tenable; for, when their client repudiated the contract, as it is alleged he did do, it ceased to be effective for any purpose.

It is contended by appellee's counsel that the appellant cannot recover the value fixed on the property by the contract, and that the complaint is therefore insufficient. There is a plain fallacy in this argument. If a complaint states facts entitling the plaintiff to relief, it will repel a demurrer, although it may not entitle him to all the relief prayed. *Bayless v. Glenn*, 72 Ind. 5, and cases cited. The question as to the measure of damages is not presented by a demurrer to a complaint, where a cause of action is presented entitling the plaintiff to some damages, for the question which the demurrer presents is whether the facts are sufficient to constitute a cause of action. The material and controlling question in the case is this: Will an action to recover the actual loss, sustained by a plaintiff, lie against an infant who has obtained property on the faith of a false and fraudulent representation that he is of full age?

Infants are, in many cases, liable for torts committed by them, but they are not liable where the wrong is connected with a contract, and the result of the judgment is to indirectly enforce the contract. Judge Cooley says: "If the wrong grows out of contract relations, and the real injury consists in the non-performance of the contract into which the party wronged has entered with an infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it, or omission of duty under it, as a tort." Cooley, Torts, 116. In another place the same author says: "So, if an infant effects a sale by means of deception and fraud, his infancy protects him." Cooley, Torts, 107. Addison, following the English cases, says an infant is not liable "if the cause of action is grounded on

a matter of contract with the infant, and constitutes a breach of contract as well as a tort." Add. Torts, par. 1314.

Upon this principle it has been held in some of the cases that an infant is not liable for the value of property obtained by means of false representations. *Howlett v. Haswell*, 4 Camp. 118; *Green v. Greenbank*, 2 Marsh. 485; *Vasse v. Smith*, 6 Cranch, 226, 3 L. Ed. 207. 1 Am. Lead. Cas. 237; *Studwell v. Shapter*, 54 N. Y. 249. It is also generally held that an infant is not estopped by a false representation as to his age; but this doctrine rests upon the principle that one under the disability of coverture or infancy has no power to remove the disability by a representation. *Carpenter v. Carpenter*, 45 Ind. 142; *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Ward v. Insurance Co.*, 108 Ind. 301, 9 N. E. 361.

It is evident, from this brief reference to the authorities, that it is not easy to extract a principle that will supply satisfactory reasons for the solution of the difficulty here presented. It is to be expected that we should find, as we do, stubborn conflict in the authorities as to the question here directly presented, namely, whether an action will lie against an infant for falsely representing himself to be of full age. *Johnson v. Pye*, 1 Sid. 258; *Price v. Hewett*, 8 Exch. 146; *Association v. Fairhurst*, 9 Exch. 422; *Brown v. Dunham*, 1 Root (Conn.) 272; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 309; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Vance v. Word*, 1 Nott & McC. (S. C.) 197, 9 Am. Dec. 683; *Fitts v. Hall*, 9 N. H. 441; *Norris v. Vance*, 3 Rich. (S. C.) 164; *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659.

Our judgment, however, is that, where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract; for the recovery is not upon the contract, as that is treated as of no effect, nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached, and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability; for it concedes this, but affirms that he must answer for his positive fraud.

Our conclusion that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age is well sustained by authority, although, as we have said, there is a fierce conflict, and it is strongly entrenched in principle. It has been sanctioned

by this court, although, perhaps, not in a strictly authoritative way; for it was said by Worden, J., speaking for the court, in *Carpenter v. Carpenter*, *supra*, that "the false representation by the plaintiff, as alleged, does not make the contract valid, nor does it estop the plaintiff to set up his infancy, although it may furnish ground of an action against him for tort. See 1 Pars. Cont. 317; 2 Kent, Comm. (12th Ed.) 241." The reasoning of the court in the case of *Pittsburgh, etc., Co. v. Adams*, 105 Ind. 151, 5 N. E. 187, tends strongly in the same direction.

In *Neff v. Landis*, 110 Pa. 204, 1 Atl. 177, it was said: "It cannot be doubted that a minor who, under such circumstances, obtains the property of another, by pretending to be of full age and legally responsible, when in fact he is not, is guilty of a false pretense, for which he is answerable under the criminal law. 2 Whart. Cr. Law, 2099." If it be true, as asserted in the case from which we have quoted, that an infant who falsely and fraudulently represents himself to be of full age is amenable to the criminal law, it must be true that he is responsible in an action of tort to the person whom he has wronged.

The earlier English cases were undoubtedly against our conclusion, but the later cases seem to take a different view of the question. Thus, in *Ex parte Unity, etc., Ass'n*, 3 De Gex & J. 63, it was held that, in equity, an infant, who falsely and fraudulently represented himself to be of full age, was bound to pay the obligation entered into on the faith of his representation. In the note to the case of *Humphrey v. Douglass*, 33 Am. Dec. 177, Mr. Freeman says, in speaking of the decision in *Kilgore v. Jordan*, 17 Tex. 341, that, "aside from any question of authority, the rule given in the case last cited by Hemphill, C. J., as the rule of the Spanish, derived from the civil law, that if a minor represents himself to be of age, and from his person he appears to be so, he will be bound by any contract made with him, seems to be most consonant with reason and justice." Mr. Pomeroy pushes the doctrine much further than we are required to do here, for he says, "If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were an adult, and may cancel a conveyance or executed contract obtained by fraud." 2 Pom. Eq. 465.

In addition to cases cited which sustain our view may be cited the following authorities: *Fitts v. Hall*, 9 N. H. 441; *Eckstein v. Frank*, 1 Daly (N. Y.) 334; *Schunemann v. Paradise*, 46 How. Prac. (N. Y.) 426; *Tyler, Inf.* 182; 1 Pars. Cont. 317, note; 1 Story, Eq. 385.

The English cases recognize a distinction between suits of equitable cognizance and actions at law, and declare that a representation as to age, when falsely and fraudulently made, will bind an infant in equity. *Ex parte Unity, etc., Ass'n*, *supra*, and authorities cited. Under our system, we can recognize no such distinction,—a distinction which is, as we think, a shadowy one under any system, for, in our system, the

rules of law and equity are merged and mingled. Under such a system as ours, courts should pursue such a course as will render justice to suitors under the rules of equity, which, after all, are but the embodiment of the principles of natural justice.

It cannot be the duty of any court of Indiana to deny substantial justice because the complaint states a cause of action in a peculiar form; for, under our system, courts must render such judgments as yield justice to those who invoke their aid, irrespective of mere forms, in all cases where the substantial facts are stated, and are such as entitle the party to the general relief sought. They will not inquire whether the proceeding which asks their aid is at law or in equity, but they will render justice, to those who ask it, in the method prescribed by our Code of Civil Procedure. It is laid down as a general rule by all the text writers that infants are liable for their torts; but many of these writers, when they come to consider such a question as we have here, are sorely perplexed by the early English decisions, and, by subtle refinement, attempt to discriminate between pure torts and torts connected with contracts, and to create an artificial class of actions. Their reasoning is not satisfactory.

Aside from mere personal torts, it is scarcely possible to conceive a tort not in some way connected with a contract, and yet all the authorities agree that the liability of infants is not confined to mere personal torts. There is a connection between a contract and a tort in every case of bailment, of the bargain and sale of personal property, and of the purchase and sale of real estate; and, if an infant is not responsible for his fraudulent representation of his age in connection with such transaction, there is not within the whole range of business transactions any case in which he could be made liable for his fraud. There are many cases, far too numerous for citation, where there is some connection between the contract and the tort, and yet it is unhesitatingly held that the infant is liable for his tort. Cooley, *Torts*, 112, authorities cited in notes.

The cases certainly do agree—it is, indeed, difficult, if not impossible, to perceive how it could be otherwise—that, although there may be some connection between the contract and the wrong, the infant may be liable for his tort. It seems to us that the only logical and defensible conclusion is that he is liable, to the extent of the loss actually sustained, for his tort, where a recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise?

There is no enforcement of a promise where an infant, who has been guilty of a positive fraud, is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith, and has exercised due diligence; nor does such a rule open the way for designing men to take advantage of an infant, for it holds one who

contracts with an infant to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, for it allows him only compensation for the actual loss sustained. It does not permit him to make any profit out of an executory contract, but it simply makes good his actual loss.

It is worthy of observation that, in the cases which hold that an infant's representation will not estop him to deny his disability, it is generally declared that he may, nevertheless, be held liable for his tort. It may often happen that the age and appearance of the infant will be such as to preclude a recovery for a fraud, because reasonable diligence, which is exacted in all cases, would warn the plaintiff of the nonage of the defendant. On the other hand, the infant may be in years almost of full age, and in appearance entirely so, and thus deceive the most diligent by his representations. Suppose a minor who is really 20 years and 10 months old, but in appearance a man of full age, should obtain goods by falsely and fraudulently representing that he is 21 years of age, ought he not, on the plainest principles of natural justice, to be held liable, not on his contract, but for the loss occasioned by his fraud?

The rule which we adopt will enable courts to protect, in some measure, the honest and diligent, but none other, who are misled by a false and fraudulent representation; and it will not open the way to imposition upon infants, for in no event can anything more than the actual loss sustained be recovered, and no person who trusts where fair dealing and due diligence require him not to trust can reap any benefit. It will not apply to an executory contract which an infant refuses to perform, for, in such a case, the action would be on the promise, and the only recovery that could be had would be for the breach of contract, and the terms of our rule forbid such a result; but it will apply where an infant, on the faith of his false and fraudulent representation, obtains property from another, and then repudiates his contract.

Any other rule would, in many cases, suffer a person guilty of positive fraud to escape loss, although his fraud had enabled him to secure and make way with the property of one who had trusted in good faith to his representation, and had exercised due care and diligence. We are unwilling to sanction any rule which will enable an infant, who has obtained the property of another by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself, or selling it to another, and, when asked to pay its just and reasonable value, successfully plead his infancy. Such a rule would make the defense of infancy both a shield and a sword, and this is a result which the principles of justice forbid, for they require that it should be merely a shield of defense.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

II. Insane Persons *

1. IN GENERAL

HOVEY v. HOBSON.

(Supreme Judicial Court of Maine, 1866. 53 Me. 451, 89 Am. Dec. 705.)

APPLETON, C. J. On July 27, 1835, Stephen Neal, then owning the land in controversy, conveyed the same to Samuel E. Crocker, from whom the tenant by various mesne conveyances derives his title.

On December 28, 1836, Stephen Neal died, leaving Lydia Dennett, then wife of Oliver Dennett, his sole heiress at law. On December 18, 1851, Oliver Dennett died.

On July 15, 1858, Lydia Dennett conveyed the demanded premises to the plaintiff.

The plaintiff introduced evidence tending to show that Stephen Neal at the date of his deed to Crocker was insane, and claimed to avoid said deed by reason of such insanity.

After the testimony reported had been introduced, the presiding justice ruled "that, if Samuel E. Crocker without fraud, for an adequate consideration, purchased the land of Stephen Neal, and afterwards said Crocker and those claiming under him, conveyed said land in good faith until it came into the hands of the tenant, for a valuable consideration, without any knowledge on his part of any defect in the title, or of any right or claim of any other person therein, then Mrs. Dennett or those claiming under her could not avoid her father's deed as against the defendant, on the ground of his unsoundness of mind; and that the tenant would be entitled to a verdict."

If Crocker, "without fraud, for an adequate consideration, purchased the land of Stephen Neal," Neal being sane, his grantees would undoubtedly acquire a good title. The ruling is that, if insane, the same result would follow, the grantees of Crocker being bona fide purchasers, and ignorant of the insanity of Neal. The questions therefore arise, (1) as to the rights of an insane man when restored to sanity, or of his heirs to avoid, as against his immediate grantee, his deed executed and delivered when insane; and, (2) as to the rights of those deriving a title in good faith without notice, and for a valid consideration from such grantee.

1. The deed of an insane man not under guardianship is not void but voidable, and may be confirmed by him if afterwards sane, or by his heirs. If under guardianship, the deed is absolutely void. Wait

* For discussion of principles, see Clark on Contracts (2d Ed.) §§ 117-121.

v. Maxwell, 5 Pick. (Mass.) 219, 16 Am. Dec. 391. The right of avoiding a contract exists, notwithstanding the person with whom the insane man contracted was not apprized of and had no reason to suspect the existence of such insanity, and did not overreach him by any fraud or deception. *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372. So an infant may avoid his contract, though the person dealing with him supposed him of age (*Van Winkle v. Ketcham*, 3 Caines [N. Y.] 323); or even when he fraudulently and falsely represented himself of age. *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105. The deed of an insane man being voidable, he may ratify it after he becomes sane, or his heirs after his decease. *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744.

An insane person or his guardian may bring an action to recover land of which a deed was made by him while insane, without first restoring the consideration to the grantee, the deed not having since been ratified nor confirmed. *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414. In this case, the remark of Shaw, C. J., in *Arnold v. Iron Works*, 1 Gray (Mass.) 434, that if "the unfortunate person of unsound mind, coming to the full possession of his mental faculties, desires to relieve himself from a conveyance made during his incapacity, he must first restore the price, if paid, or surrender the contract for it, if unpaid," is limited and restricted by Thomas, J., "to the case of a grantor having in his possession the notes which were the consideration of the deed and restored to the full possession of his mind."

In the deed or other contract of an insane man the consenting mind is wanting. "To say that an insane man," observes Thomas, J., "before he can avoid a voidable deed, must first put the grantee in statu quo, would be to say, in effect, that, in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was when the bargain was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. It would be absurd to annul the bargain for the mental incompetency of a party, and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming, when with restored intellect he shall seek its annulment." Lunatics and persons non compos are not bound by their contracts, though no fraud nor imposition has been practiced on them. *Chew v. Bank*, 14 Md. 318.

The ruling presupposes a sale without fraud and for an adequate consideration. That a grantor sold his land for a fair price, that the purchase money was fully secured, that in the transaction he evinced by his conduct a knowledge of the value of his property and capacity in its management, would go far to negative an utter incompetency to contract, inferable only from a loss of memory common to old age or from a disregard of the decencies or courtesies of life. So the

conversion by a feeble old man past labor, of property unproductive and burdened by taxation, into notes well secured and bringing an annual income, would hardly be deemed proof of utter imbecility, if the price was equal to the fair market value of the property sold.

As the deed of an insane man is voidable only, it follows that it is capable of subsequent ratification by the grantor if he be restored to reason, or by his heirs. The retention of the notes after such restoration and the receiving payments on them, would be evidence of such ratification. In the analogous case of infancy, it seems that there may be an acquiescence by the grantor under such circumstances as would amount to an equitable estoppel. In *Wallace's Lessee v. Lewis*, 4 Har. (Del.) 75, it was held, that an infant's acquiescence in a conveyance for four years after age and seeing the property extensively improved, would be a confirmation. Though mere lapse of time will not amount to a confirmation, unless continued for twenty years, yet in connection with other circumstances it may amount to a ratification. *Cresinger v. Welch*, 15 Ohio, 156, 45 Am. Dec. 565; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251. Whether, in the case before us, the deed of Stephen Neal has been affirmed by the reception, by those authorized, of the purchase money for the land, or the heir at law after the death of her husband or the passage of the laws in relation to married women is equitably estopped by her omission to act under circumstances which required action on her part, are questions which at this time are not pressing for consideration.

It is true the English courts adopt a somewhat different doctrine from that of the American courts as to the right of an insane man when sane, or of his heirs to avoid a deed or contract executed when insane. Thus, in *Selby v. Jackson*, 6 Beav. 200, Lord Langdale refused to set aside a deed executed in good faith by an insane man and for an adequate consideration, when the parties could not be reinstated. "There are," observes Tuck, J., in *Chew v. Bank*, 14 Md. 318, "many cases in England to show that such persons are held by their contracts unless fraud and imposition have been practiced, but to this we cannot assent. The doctrine in this country is the other way, and, as we think, is sustained by better reasoning than the English rule as announced in some of their decisions. The effect in many cases would be to place lunatics on the same footing with persons of sound mind, with less effective means to protect the injured party against the fraud, for at law, as well as in equity, fraud or imposition may be relied on, without reference to the mental capacity of the parties except so far as such defect may give weight to other facts, from which the fraud may be deduced."

The ruling, however, in the case at bar, is not in accordance with that of the English courts, which require that, in addition to good faith and a full consideration, the person contracting should be apparently of sound mind, and not known to be otherwise to the party

with whom he contracts. *Molton v. Camroux*, 2 Exch. 487. These elements are not required by the ruling under consideration.

2. It is insisted, even if the deed of Neal might have been avoided as between the original grantor and grantee, that this right of avoidance ceases when the title has passed into the hands of third persons in good faith, for an adequate consideration, and ignorant of any facts tending to impeach such title.

It is apparent that the protection of the insane and the idiotic will be materially diminished, if the heirs cannot follow the property conveyed, but are limited in their right of avoidance to the immediate grantee of such insane or idiotic person.

The acts of lunatics and infants are treated as analogous, and subject to the same rules. *Key v. Davis*, 1 Md. 32; *Hume v. Barton*, 1 Ridg. Pl. 77. "The grants of infants and persons non compos are parallel both in law and reason." *Thompson v. Leach*, 3 Mod. 310.

The law is well settled that a minor when of age may avoid his deed given when an infant. He may do this not merely against his grantee, but he may follow the title wherever it may be found and recover his land. "It may be objected," observes Marshall, J., in *Myers v. Sanders' Heirs*, 7 Dana (Ky.) 524, "that these restrictions upon the right of an adult to avoid his deed obtained by fraud are inconsistent with the principle which allows an infant to avoid his deed, into whose hands soever the bill may have passed and without regard to time, except as a statutory bar running after he becomes of age. But, waiving the inquiry how far the mere acquiescence of an infant grantee after he becomes of age may determine his right of revoking his title from the hands of a purchaser for value, who has acquired it after such acquiescence, we think the analogy between the cases is too slight to have any decisive influence upon the present question. The right of an infant to avoid his deed is an absolute uncontrollable privilege, founded upon an incapacity conclusively fixed by the law to bind himself absolutely by deed or to pass an indefeasible title. These principles are irreversibly fixed by the law, and it enforces them without inquiring into particular circumstances, and without regard to consequences. It must do so in order to maintain them. The right of an adult grantor, to avoid his deed for fraud, stands upon an entirely different basis. It grows out of the particular circumstances; it is founded in a regard to justice between man and man; it is given as a remedy for the hardship of his case. In its very foundation and essence, it is limited by the justice which is due to others, and therefore cannot be exercised without a regard to their rights and interests."

"But again, infancy is not, like fraud, a circumstance wholly extraneous from the title. The deed shows who the grantee is; the purchaser knows that an infant grantee cannot pass an indefeasible title; he is bound to know the identity of the person, who assumes to con-

vey the title; and it is not an unreasonable requisition that he shall know whether the grantee, under whom he claims title, is under incapacity or not. In this view of the subject, no purchaser under an infant's deed is innocent in the eye of the law, until the title has been confirmed by the matured consent of the grantor." In *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285, the suit was against one claiming by a title derived from the grantee of the minor, but the ground was not taken that in consequence thereof the tenant had an indefeasible title.

The principles applicable to deeds voidable for the infancy of the grantor are equally applicable where the grantor is insane. When a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith and for an adequate consideration a title from such grantee. He has the ability to convey an indefeasible title,—and he does convey such title to all bona fide purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee, whose title is thus derived, must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of the insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against bona fide purchasers from the grantee. 1 Am. Lead. Cas. 259.

Exceptions sustained. The case to stand for trial.

2. RATIFICATION AND AVOIDANCE

MUTUAL LIFE INS. CO. v. HUNT.

(Court of Appeals of New York, 1879. 79 N. Y. 541.)

DANFORTH, J. The action is for the foreclosure of a bond and mortgage, dated April 23, 1870, and then executed by the defendant Hunt for the purpose of securing to the plaintiff the payment of \$4,000 on the 1st of September, 1871. The complaint shows that interest was paid on the 1st of March, 1871, but default made in September following; that in December, 1871, the defendant Hunt was adjudged a lunatic, and Arnold H. Wagner appointed committee of her person and estate. He was made co-defendant with her; and in her behalf, and by way of defense, alleges "that at the time of the execution of the bond and mortgage she was a lunatic, and incapable of making or executing them."

The issue thus presented was tried before a careful and experienced judge at special term and he found as a fact: "That at the time of the execution and delivery of the bond and mortgage, the said Camilla Hunt was of sound mind, and was capable of making and executing said bond and mortgage," and ordered judgment in accordance with the prayer of the complaint. The finding is well warranted by the evidence, and upon this ground alone we should be required to affirm the judgment.

But the learned court at general term went beyond it and for the purposes of the appeal assumed, without deciding the contrary of the finding to be the truth, yet held that as the case presented a contract executed upon a valuable consideration, of which the lunatic had the benefit, made by the plaintiff "in good faith, without fraud or unfairness, without knowledge of the insanity, and without notice or information calling for inquiry," the plaintiff was entitled to recover. The correctness of this conclusion is strenuously assailed by the learned counsel for the appellant, but both upon principle and authority we think it must be sustained. Upon principle because the plaintiff's money was had by the defendant, appropriated to her use, and thus tended to increase the body of her estate, and although in some cases a man may now, notwithstanding the old common-law maxim to the contrary (*Beverly's Case*, 2 Coke, 568, pt. 4, 123b), "be admitted to stultify himself" yet he cannot do so to the prejudice of others, for he would thus make his own misfortune an excuse for fraud, and against that the doctrine of the maxim stands unaffected by any exception. 1 Story, Eq. Jur. § 226. In this case the loan was made in the ordinary course of business; it was a fair and reasonable transaction; the defendant acted for herself, but with the aid of an attorney; if mental unsoundness existed it was not known to the plaintiff, and the parties cannot now be put in statu quo. The defendant was therefore properly held liable.

Very much in point and upon circumstances similar to those above stated was *Molton v. Camroux*, 2 Welsb. H. & G. 487; affirmed in error, 4 Welsb. H. & G. 17. Concerning it the chancellor, in *Elliott v. Ince*, 7 De Gex, M. & G. 487, says: "The principle of that case was very sound, viz.: that an executed contract, when parties have been dealing fairly and in ignorance of the lunacy, shall not afterward be set aside; that was a decision of necessity, and a contrary doctrine would render all ordinary dealings between man and man unsafe." And so it has been held, and like contracts enforced upon the same principle, in repeated instances, in the courts of this and other states. *Loomis v. Spencer*, 2 Paige, 153; *Matter of Beckwith*, 3 Hun, 443; *Canfield v. Fairbanks*, 63 Barb. 461; *Bank v. Moore*, 78 Pa. 407, 21 Am. Rep. 24; *Wilder v. Weakley*, 34 Ind. 181; *Matthiessen v. McMahon*, 38 N. J. Law, 536; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428.

These cases stand on the maxim "that he who seeks equity must do equity," and it is applicable to the case in hand; for the defendant seeks to deprive the plaintiff of its remedies to enforce the security while she retains the benefit of the contract. This is so plainly inequitable and unjust as to render a further discussion unnecessary. Nor does the fact that the borrower was subsequently, upon inquisition taken, declared to be insane, alter the result. Such proceeding has no effect upon a contract made without such notice, and on the faith of the presumption that the person contracted with was of competent understanding.

The judgment should be affirmed. All concur. Judgment affirmed.

III. Drunken Persons ⁴

BARRETT v. BUXTON.

(Supreme Court of Vermont, 1826. 2 Aikens, 167, 16 Am. Dec. 691.)

PRENTISS, J.⁵ This is an action upon a promissory note, executed by the defendant to the plaintiff for the sum of \$1000, being the difference agreed to be paid the plaintiff on a contract for the exchange of lands. The agreement of exchange was in writing, and the plaintiff afterwards tendered to the defendant a deed, in performance of his part of the agreement, which the defendant refused. The defendant offered evidence to prove, that at the time of executing the note and agreement, he was intoxicated, and thereby incapable of judging of the nature and consequences of the bargain. The court refused to admit the evidence, without proof that the intoxication was procured by the plaintiff. The question is, whether the evidence was admissible as a defence to the action, or, in other words, whether the defendant could be allowed to set up his intoxication to avoid the contract.

This question has been already substantially decided by the court on the present circuit; but the importance of the question, and the magnitude of the demand in this case, have led us to give it further consideration. According to *Beverley's Case*, 4 Co. 123, a party cannot set up intoxication in avoidance of his contract under any circumstances. Although Lord Coke admits, that a drunkard, for the time

⁴ For discussion of principles, see *Clark on Contracts* (2d Ed.) §§ 122, 123.

⁵ The statement of facts is omitted.

of his drunkenness, is non compos mentis, yet he says, "his drunkenness shall not extenuate his act or offence, but doth aggravate his offence, and doth not derogate from his act, as well touching his life, lands, and goods, as any thing that concerns him." He makes no distinction between criminal and civil cases, nor intimates any qualification of his doctrine, on the ground of the drunkenness being procured by the contrivance of another who would profit by it. His doctrine is general, and without any qualification whatever; and connected with it, he holds, that a party shall not be allowed to stultify himself, or disable himself, on the ground of idiocy or lunacy.

The latter proposition is supported, it is true, by two or three cases in the year books, during the reigns of Edward III and Henry VI; by Littleton, s. 405, who lived in the time of Hen. VI; and by Stroud v. Marshall, Cro. Eliz. 398, and Cross v. Andrews, Cro. Eliz. 622. Sir William Blackstone, however, who traces the progress of this notion, as he calls it, considers it contrary to reason, and shows that such was not the ancient common law. The Register, it appears, contains a writ for the alienor himself, to recover lands aliened by him during his insanity; and Britton states, that insanity is a sufficient plea for a man to avoid his own bond. Fitzherbert also contends, "that it stands with reason that a man should show how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time." Blackstone considers the rule as having been handed down from the loose cases in the times of Edw. III, and Hen. VI, founded upon the absurd reasoning, that a man cannot know, in his sanity, what he did when he was non compos mentis, and he says, later opinions, feeling the inconvenience of the rule, have, in many points, endeavoured to restrain it. 2 Blac. Com. 291.

In Thompson v. Leach, 3 Mod. 301, it was held, that the deed of a man non compos mentis, was not merely voidable, but was void ab initio, for want of capacity to bind himself or his property. In Yates v. Boen, 2 Stra. 1104, the defendant pleaded non est factum to debt on articles, and upon the trial, offered to give lunacy in evidence. The chief justice at first thought it ought not to be admitted, upon the rule in Beverley's Case, that a man shall not stultify himself; but on the authority of Smith v. Can, in 1728, where Chief Baron Pengelley, in a like case admitted it; and on considering the case of Thompson v. Leach, the chief justice suffered it to be given in evidence, and the plaintiff became nonsuit. The most approved elementary writers and compilers of the law refer to this case, and lay it down as settled law, that lunacy may be given in evidence, on the plea of non est factum, by the party himself; and it is said to have been so ruled by Lord Mansfield, in Chamberlain of London v. Evans, mentioned in note to 1 Chit. Pl. 470.

In this country, it has been decided in several instances, that a party may take advantage of his own disability, and avoid his contract, by

showing that he was insane and incapable of contracting. *Rice v. Peet*, 15 Johns. (N. Y.) 503; *Webster v. Woodford*, 3 Day (Conn.) 90. These decisions are founded in the law of nature and of justice, and go upon the plain and true ground, that the contract of a party non compos mentis is absolutely void, and not binding upon him. The rule in *Beverley's Case*, as to lunacy, therefore, is not only opposed to the ancient common law, and numerous authorities of great weight, but to the principles of natural right and justice, and cannot be recognized as law; and it is apprehended, that the case is as little to be regarded, as authority in respect to intoxication, which rests essentially upon the same principle.

It is laid down in *Buller's N. P.* 172, and appears to have been decided by Lord Holt, in *Cole v. Robins*, there cited, that the defendant may give in evidence under the plea of non est factum to a bond, that he was made to sign it when he was so drunk that he did not know what he did. And in *Pitt v. Smith*, 3 Campb. Cas. 33, where an objection was made to an attesting witness being asked whether the defendant was not in a complete state of intoxication when he executed the agreement, Lord Ellenborough says, "you have alleged that there was an agreement between the parties; but there was no agreement, if the defendant was intoxicated in the manner supposed. He had not an agreeing mind. Intoxication is good evidence upon a plea of non est factum to a deed, of non consessit to a grant, and of non assumpsit to a promise." Chitty, Selwyn, and Phillips lay down the same doctrine and Judge Swift in his digest says, that an agreement, signed by a man in a complete state of intoxication, is void. 1 Chit. Pl. 470; Selw. N. P. 563; 1 Phil. Ev. 128; 1 Swift's Dig. 173.

In these various authorities, it is laid down generally, and without any qualification, that drunkenness is a defence, and no intimation is made of any distinction, founded on the intoxication being procured by the party claiming the benefit of the contract. It is true, that in *Johnson v. Medlicott*, 3 P. Wms. 130, that circumstance was considered essential to entitle the party to relief in equity against his contract. Sir Joseph Jekyl held, that the having been in drink was not any reason to relieve a man against his deed or agreement, unless the party was drawn into drink by the management or contrivance of him who gained the deed. But from what is said in 1 Fonb. Eq. 68, it would not seem that the author considered this circumstance as indispensable. He says, equity will relieve, especially if the drunkenness were caused by the fraud or contrivance of the other party, and he is so excessively drunk, that he is utterly deprived of the use of his reason or understanding; for it can by no means be a serious and deliberate consent; and without this, no contract can be binding by the law of nature. In *Spiers v. Higgins*, decided at the Rolls in 1814, and cited in 1 Mad. Ch. 304, a bill filed for a specific performance of an agreement, which was entered into with the defendant when

drunk, was dismissed with costs, although the plaintiff did not contribute to make the defendant drunk.

On principle, it would seem impossible to maintain, that a contract entered into by a party when in a state of complete intoxication, and deprived of the use of his reason, is binding upon him, whether he was drawn into that situation by the contrivance of the other party or not. It is an elementary principle of law, that it is of the essence of every contract, that the party to be bound should consent to whatever is stipulated, otherwise no obligation is imposed upon him. If he has not the command of his reason, he has not the power to give his assent, and is incapable of entering into a contract to bind himself. Accordingly Pothier holds, (vol. 1, c. 1, a. 4, s. 1.) that ebriety, when it is such as to take away the use of reason, renders the person who is in that condition, while it continues, unable to contract, since it renders him incapable of assent. And it seems Heineccius and Puffendorf both consider contracts entered into under such circumstances, as invalid. By the Scotch law, also, an obligation granted by a person while he is in a state of absolute and total drunkenness, is ineffectual, because the grantor is incapable of consent; but a lesser degree of drunkenness, which only darkens reason, is not sufficient. Ersk. Inst. 447. The author of the late excellent treatise on the principles and practice of the court of chancery, after reviewing the various cases in equity on the subject, and citing the Scotch law with approbation, observes: "The distinction thus taken seems reasonable; for it never can be said that a person absolutely drunk, has that freedom of mind, generally esteemed necessary to a deliberate consent to a contract; the reasoning faculty is for a time deposed. At law it has been held, that upon *non est factum* the defendant may give in evidence, that they made him sign the bond when he was so drunk that he did not know what he did. So a will made by a drunken man is invalid. And will a court of equity be less indulgent to human frailty? It seems to be a fraud to make a contract with a man who is so drunk as to be incapable of deliberation." 1 Mad. Ch. 302. Mr. Maddock seems to consider it as settled, that at law, complete intoxication is a defence, and that it ought to be a sufficient ground for relief in equity; and, indeed, it would seem difficult to come to a different conclusion.

As it respects crimes and torts, sound policy forbids that intoxication should be an excuse; for if it were, under actual or feigned intoxication, the most atrocious crimes and injuries might be committed with impunity. But in questions of mere civil concern, arising *ex contractu*, and affecting the rights of property merely, policy does not require that any one should derive an unjust profit from a bargain made with a person in a state of intoxication, although brought upon himself by his own fault, or that he should be a prey to the arts and circumvention of others, and be ruined, or even embarrassed, by a bargain, when thus deprived of his reason. It is a violation of moral

duty, to take advantage of a man in that defenceless situation, and draw him into a contract; and if the intoxication is such as to deprive him of the use of his reason, it cannot be very material, whether it was procured by the other party, or was purely voluntary. The former circumstance would only stamp the transaction with deeper turpitude, and make it a more aggravated fraud.

The evidence which was offered and rejected at the trial in the case before us, went not only to show that the defendant was so intoxicated at the time of giving the note, as to be incapable of the exercise of his understanding, but that the contract was grossly unequal and unreasonable; and, both on principle and authority, we think the evidence was admissible, and that a new trial must be granted. New trial granted.

IV. Married Women *

GREGORY v. PIERCE.

(Supreme Judicial Court of Massachusetts, 1842. 4 Metc. 478.)

Assumpsit on a promissory note, signed by the defendant in the presence of an attesting witness, dated October 6th, 1825, and payable to Putnam & Gregory, partners, of whom the plaintiff is survivor.

The case submitted to the court of common pleas, on an agreed statement of facts, as follows: "The defendant was married to Varney Pierce, Jr., in 1806, who, in 1816, became insolvent, and left her and went out of the commonwealth, and did not return till 1818, when he came back and remained with her about a week. He then left her and went to Ohio, where he remained till his death in 1832. He made no provision for the support of his wife and family, after he left her in 1816; but she supported herself and family, after he left her, by her own labor, contracting debts and making contracts in her own name. Putnam & Gregory employed her to do work for them, and supplied her with necessaries for the support of herself and family; and the note in suit was given for the balance of account between the parties."

The court of common pleas rendered judgment for the plaintiff, and the defendant appealed to this court.

SHAW, C. J. The principle is now to be considered as established in this state, as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a

* For discussion of principles, see Clark on Contracts (2d Ed.) § 124.

suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a feme sole. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm. *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. 89. In the latter case, it was held, that in this respect, the residence of the husband in another state of these United States, was equivalent to a residence in any foreign state; he being equally beyond the operation of the laws of the commonwealth, and the jurisdiction of its courts.

But, to accomplish this change in the civil relations of the wife, the desertion by the husband, must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a feme sole. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm.

In the present case, the court are of opinion, that the circumstances stated are not sufficient to enable the court to determine whether the husband had so deserted his wife, when the note in question was given. The only facts stated are, that he was insolvent when he went away; that he was absent, residing seven or eight years in Ohio; that he made no provision for his wife and her family, after 1816; and that she supported herself and them by her own labor. But it does not appear that he was of ability to provide for her; that he was not in correspondence with her; that he declared any intention to desert her, when he left, or manifested any such intention afterwards; or that he was not necessarily detained by sickness, imprisonment or poverty.

The fact of desertion by a husband may be proved by a great variety of circumstances leading with more or less probability to that conclusion; as, for instance, leaving his wife, with a declared intention never to return; marrying another woman or otherwise living in adultery, abroad; absence for a long time, not being necessarily detained by his occupation or business, or otherwise; making no provision for his wife, or wife and family, being of ability to do so; providing no dwelling or home for her, or prohibiting her from following him; and many other circumstances tending to prove the absolute desertion before described. The general rule being that a married woman cannot make a contract or be sued, the burden of proof is upon the plaintiff to show that she is within the exception. In an agreed statement of facts, such fact of desertion, using this term in the technical sense above expressed, as a total renunciation of the marriage relation, must be agreed to, or such other facts must be agreed to, as to render the conclusion inevitable. If the facts stated are all that can be proved in the case,

the court would consider that the plaintiff had not sustained the burden of proof, and therefore could not have judgment. See *Williamson v. Daves*, 9 Bing. 292; *Stretton v. Bushnach*, 4 Moore & S. 678. 1 Bing. 139; *Bean v. Morgan*, 4 McCord (S. C.) 148.

But apprehending that the statement may have been agreed to, under a misapprehension of the legal effect of the facts stated, and that other evidence may exist, the court are of opinion, and do order, that the agreed statement of facts be discharged, and a trial had at the bar of the court of common pleas.

V. Corporations *

DOWNING v. MT. WASHINGTON ROAD CO.

(Supreme Court of New Hampshire, 1860. 40 N. H. 230.)

Assumpsit, brought by Lewis Downing & Sons, to recover the price of eight omnibuses, and a model for the same, one light wagon, and one baggage wagon, made for the defendants, under a contract entered into by D. O. Macomber, president of the defendant corporation in their behalf.

The light wagon was made and sent to one Cavis, the agent for building the road, and was used by him in making it. The omnibuses and baggage wagon were intended to be used in conveying passengers up and down the mountain, after the road was completed. The omnibuses were constructed in a peculiar way, and are not fit for use on ordinary roads.

By their act of incorporation, passed July 1, 1853, the corporation was empowered to lay out, make, and keep in repair, a road from such point in the vicinity of Mt. Washington as they may deem most favorable, to the top of said mountain, etc., and thence to some point on the northwesterly side of said mountain, etc., to take tolls of passengers and for carriages, to build and own toll-houses, and to take land for their road.

The corporation was duly organized, and at a meeting of the directors on the 31st of August, 1853, before said contract was made, it was "voted that the president be the legal agent and commissioner of the company;" and his compensation as such was fixed.

"The president" was "directed to proceed with the letting of the work for the construction of the road, * * * the obtaining the

* For discussion of principles, see Clark on Contracts (2d Ed.) §§ 125-127.

right of way," and "what other action he shall deem proper for the interests of the company," etc.

A committee was appointed "to settle in relation to the right of way, etc., and in relation to land on which to build stables and other buildings, for the use of the road, and also for building all such stables and houses as may be necessary for the operations of the company."

It appeared that by an additional act, passed July 12, 1856, the corporation were authorized "to erect and maintain, lease and dispose of any building or buildings, which may be found convenient for the accommodation of their business, and of the horses and carriages and travellers passing over said road."

The defendants denied the authority of Macomber to make such a contract in behalf of the corporation, and the power of the corporation under its charter either to authorize or to enter into such a contract.

BELL, C. J. Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established. *Trustees v. Peaslee*, 15 N. H. 330; *Perrine v. Chesapeake Canal Co.*, 9 How. 172, 13 L. Ed. 92. In giving a construction to the powers of a corporation, the language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. *Enfield Bridge v. Hartford R. R.*, 17 Conn. 454, 44 Am. Dec. 556; *Straus v. Eagle Co.*, 5 Ohio St. 59.

If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation.

In the present case the power to take the lands of others, and to take tolls of travellers, must be strictly construed, if doubts should arise on those points; but it is not seen that the other grants to the defendant corporation should not receive a fair natural construction.

The charter of the Mt. Washington Road empowers them to lay out, make and keep in repair, a road from Peabody River Valley to the top of Mount Washington, and thence to some point on the north-west side of the mountain. It grants tolls on passengers and carriages, and authorizes them to take lands of others for their road, and to build and own toll-houses, and erect gates and appoint toll-gatherers to collect their tolls. The remaining provisions contain the ordinary powers of corporations relating to directors, stock, dividends, meetings, etc. Laws 1853, c. 1486.

This chapter confers the usual powers heretofore granted to turnpike corporations, and no others. The most natural and satisfactory mode of ascertaining what are the powers incidentally granted to such companies, is to inquire what powers have been usually exercised under them,

without question by the public or by the corporators. It may be safely assumed that the powers which have not heretofore been found necessary, and have not been claimed or exercised under such charters, are not to be considered generally as incidentally granted. Such charters have in former years been very common in this and other states, and they have not, so far as we are aware, been understood as authorizing the corporations to erect hotels, or to establish stage or transportation lines, to purchase horses or carriages, or to employ drivers in transporting passengers or freight over their roads; and no such powers have anywhere been claimed or exercised under them. We are, therefore, of opinion that the power to establish stage and transportation lines to and from the mountain, to purchase carriages and horses for the purpose of carrying on such a business, was not incidentally granted to the defendant corporation by their charter. *State v. Commissioners of Mansfield*, 23 N. J. Law, 510, 57 Am. Dec. 409.

But it is contended that the power to make this contract is conferred by the act in amendment of the charter, passed July 12, 1856. By this act the corporation may "erect and maintain, lease and dispose of any building or buildings which may be found convenient for the accommodation of their business, and of the horses and carriages and travellers passing over their said road." By their business, which the buildings to be erected were designed to accommodate, it is said the legislature must have intended some permanent and continuing business beyond that of merely building and maintaining a road; and that it could be no other than that of erecting a hotel on the mountain, and establishing lines of carriages, for the purpose of carrying visitors up and down the mountain.

But the foundation of this implication is very slight. The express grant is of an authority to erect, etc., buildings, not of all kinds, but such as may be found convenient for the accommodation of their business, and of travellers, etc. The business here referred to must be understood to be such as they are by their charter authorized to engage in. If nothing had been said of horses and travellers, there could hardly be any foundation for the idea that a hotel could have been contemplated by the legislature. Buildings suitable for the accommodation of their toll-gatherers and workmen employed on their road, would probably be thought everything the legislature intended to authorize by this additional act. Connected as this authority now is with travellers, horses, and carriages, there is scarce a pretence for argument that this additional act goes any further than the original act, to authorize a stage and transportation company. It is not unlikely that some of the projectors of this enterprise intended to secure much more extensive rights than those of a turnpike and hotel company, but it seems certain they have not exhibited this feature of their case to the legislature so distinctly as to secure their sanction, and the charter and its amendment as yet justifies them in no such claim.

The power of buying and selling real and personal property for the legitimate purposes of the corporation, and the power of contracting generally for the same purposes, within the limits prescribed by the charter, being granted, we understand the principle to be, that their purchases, sales, and contracts generally, will be presumed to be made within the legitimate scope and purpose of the corporation, until the contrary appears, and that the burden of showing that any contract of a corporation is beyond its legitimate powers, rests on the party who objects to it. *Indiana v. Woram*, 6 Hill (N. Y.) 37, 40 Am. Dec. 378; *Ex parte Peru Iron Co.*, 7 Cow. (N. Y.) 540; *Farmers' Loan & Trust Co. v. Clowes*, 3 N. Y. 470; *Farmers' Loan & Trust Co. v. Curties*, 7 N. Y. 466; *Beers v. Phoenix Glass Co.*, 14 Barb (N. Y.) 358.

If a corporation attempt to enforce a contract made with them in a case beyond the legitimate limits of their corporate power, that fact, being shown, will ordinarily constitute a perfect defence. *Green v. Seymour*, 3 Sandf. Ch. (N. Y.) 285; *Bangor Boom v. Whiting*, 29 Me. 123; *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. (N. Y.) 31; *New York, etc., Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100.

And if a suit is brought upon a contract alleged to be made by the corporation, but which is shown to be beyond its corporate power to enter into, the contract will be regarded as void, and the corporation may avail themselves of that defence. *Beach v. Fulton Bank*, 3 Wend. (N. Y.) 573; *Albert v. Savings Bank*, 1 Md. Ch. 407; *Abbott v. Baltimore, etc., Co.*, 1 Md. Ch. 542; *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59; *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 315; *Gage v. Newmarket*, 18 Q. B. 457.

The contract set up in this case, was made not by the corporation itself, by a vote, nor by an agent expressly authorized to sign a contract already drawn, but it was made by the president of the corporation, acting under an appointment as their general agent; and it is argued that he was fully authorized by votes of the corporation to bind them by such a contract as the present; but it is not necessary to consider this question, as we think it settled that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. This principle is distinctly recognized in *McCullough v. Moss*, 5 Denio (N. Y.) 567, overruling the case of *Moss v. Rossie Lead Co.*, 5 Hill (N. Y.) 137, and in *Central Bank v. Empire Stone-Dressing Co.*, 26 Barb. (N. Y.) 23; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 315.

The same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. 5 Denio (N. Y.) 567, above

cited. The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further.

This view seems to us entirely conclusive against the claim made for the omnibuses and model, and probably for the baggage wagon.

As to the light wagon, that may stand on a different ground. Such a wagon might be useful and necessary for the use of the agent of the company, in conducting the undoubted business of the corporation,—the building and maintaining the road.

We are unable to assent to the position taken in the argument, that a ratification of part is a ratification of the whole contract. While the corporation may be restricted from ratifying a contract beyond the scope of the objects of the corporation, there could be no such objection as to any matter clearly within their power. The other contracting party might have a right to reject such ratification, claiming that the contract is entire, and if not ratified as such, it should not be made good for a part only. But if they claim the benefit of the partial ratification, the corporation can hardly object.

REALITY OF CONSENT

I. Mistake¹

1. MISTAKE AS TO THE NATURE OF THE TRANSACTION—WRITTEN INSTRUMENT

FOSTER v. MACKINNON.

(Court of Common Pleas, 1869. L. R. 4 C. P. 704.)

BYLES, J.² This was an action by the plaintiff as indorsee of a bill of exchange for £3,000 against the defendant, as indorser. The defendant by one of his pleas traversed the indorsement, and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud.

There was contradictory evidence as to whether the indorsement was the defendant's signature at all; but, according to the evidence of one Callow, the acceptor of the bill, who was called as a witness for the plaintiff, he, Callow, produced the bill to the defendant, a gentleman advanced in life, for him to put his signature on the back, after that of one Cooper, who was payee of the bill and first indorser, Callow not saying that it was a bill, and telling the defendant that the instrument was a guarantee. The defendant did not see the face of the bill at all. But the bill was of the usual shape, and bore a stamp, the impress of which stamp was visible at the back of the bill. The defendant signed his name after Cooper's, he, the defendant (as the witness stated), believing the document to be a guarantee only.

The lord chief justice told the jury that, if the indorsement was not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict. The jury found for the defendant.

A rule nisi was obtained for a new trial, first, on the ground of misdirection in the latter part of the summing-up, and, secondly, on the ground that the verdict was against the evidence.

As to the first branch of the rule, it seems to us that the question

¹ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 130-134.

² The statement of facts is omitted.

arises on the traverse of the indorsement. The case presented by the defendant is that he never made the contract declared on; that he never saw the face of the bill; that the purport of the contract was fraudulently misdescribed to him; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing; and that his mind never went with his act.

It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign, the contract to which his name is appended.

The authorities appear to us to support this view of the law. In *Thoroughgood's Case*, 2 Coke, 9b, it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to *Thoroughgood's Case*, 2 Coke, 9b, in Fraser's edition of Coke's Reports, it is suggested that the doctrine is not confined to the condition of an illiterate grantor; and a case in Keilwey's Reports (70 pl. 6), is cited in support of this observation. On reference to that case, it appears that one of the judges did there observe that it made no difference whether the grantor were lettered or unlettered. That, however, was a case where the grantee himself was the defrauding party. But the position that if a grantor or covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him, is supported by many authorities. See Com. Dig. "Fait" (B, 2); and is recognized by Bayley, B., and the court of exchequer, in the case of *Edwards v. Brown*, 1 Crompt. & J. 312. Accordingly, it has recently been decided in the exchequer chamber that if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least, if that be done without the grantor's negligence), it is not the deed of the grantor. *Swan v. North British Australasian Land Co.*, 2 Hurl. & C. 175.

These cases apply to deeds, but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man writes his name across the back of a blank bill-stamp, and part with

it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.

In these cases, however, the party signing knows what he is doing. The indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

But in the case now under consideration the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature, for two reasons: First, that he never in fact signed the writing declared on; and, secondly, that he never intended to sign any such contract.

In the present case the first reason does not apply, but the second reason does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument.

We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed. In the case of *Ingham v. Primrose*, 7 C. B. (N. S.) 83; 28 L. J. (C. P.) 294, and in the case of *Nance v. Lary*, 5 Ala. 370, cited 1 Pars. Bills, 114, note,—both cited by the plaintiff,—the facts were very different from those of the case before us, and have but a remote bearing on the question. But in *Putnam v. Sullivan*, an American case, reported in 4 Mass. 45, 3 Am. Dec. 206, and cited in 1 Pars. Bills, p. 111, note, a distinction is taken by Chief Justice Parsons between a case where an indorser intended to indorse such a note as he actually indorsed, being induced by fraud to indorse

it, and a case where he intended to indorse a different note, and for a different purpose. And the court intimated an opinion that, even in such a case as that, a distinction might prevail, and protect the indorsee.

The distinction in the case now under consideration is a much plainer one, for on this branch of the rule we are to assume that the indorser never intended to indorse at all, but to sign a contract of an entirely different nature.

For these reasons we think the direction of the lord chief justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We abstain from giving our reasons for this part of our decision only lest they should prejudice either party on a second inquiry.

The rule, therefore, will be made absolute for a new trial. Rule absolute.

2. MISTAKE AS TO THE PERSON WITH WHOM THE CONTRACT IS MADE

CUNDY et al. v. LINDSAY et al.

(House of Lords. 1878. 3 App. Cas. 459.)

Appeal from court of appeal.

In 1873, one Alfred Blenkarn hired a room at a corner house in Wood street, Cheapside. It had two side windows opening into Wood street, but, though the entrance was from Little Love Lane, it was by him constantly described as 37 Wood street, Cheapside. His agreement for this room was signed "Alfred Blenkarn." The now respondents, Messrs. Lindsay & Co., were linen manufacturers, carrying on business at Belfast. In the latter part of 1873, Blenkarn wrote to the plaintiffs on the subject of a purchase from them of goods of their manufacture—chiefly cambric handkerchiefs. His letters were written as from "37 Wood street, Cheapside," where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into Wood street on one side, could only be reached from the entrance in 5 Little Love Lane. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear "Blenkiron & Co."

There was a highly respectable firm of W. Blenkiron & Son, carrying on business in Wood street, but at number 123 Wood street, and not at 37. Messrs. Lindsay, who knew the respectability of Blenkiron

& Son, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to "Messrs. Blenkiron & Co., 37 Wood Street, Cheapside," where they were taken in at once. The invoices sent with the goods were always addressed in the same way. Blenkarn sold the goods thus fraudulently obtained from Messrs. Lindsay to different persons, and among the rest he sold 250 dozen of cambric handkerchiefs to the Messrs. Cundy, who were bona fide purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the mayor's court of London by Messrs. Lindsay, the junior partner of which firm, Mr. Thompson, made the ordinary affidavit of debt, as against Alfred Blenkarn, and therein named Alfred Blenkarn as the debtor.

Blenkarn's fraud was soon discovered, and he was prosecuted at the Central criminal court, and convicted and sentenced. Messrs. Lindsay then brought an action against Messrs. Cundy as for unlawful conversion of the handkerchiefs. The cause was tried before Mr. Justice Blackburn, who left it to the jury to consider whether Alfred Blenkarn, with a fraudulent intent to induce the plaintiffs to give him the credit belonging to the good character of Blenkiron & Co., wrote the letters, and by fraud induced the plaintiffs to send the goods to 37 Wood street—were they the same goods as those bought by the defendants—and did the plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt Alfred Blenkarn as their debtor.

The first and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the defendants, with leave reserved to move to enter the verdict for the plaintiffs. On motion accordingly, the court, after argument, ordered the rule for entering judgment for the plaintiffs to be discharged, and directed judgment to be entered for the defendants. 1 Q. B. Div. 348. On appeal this decision was reversed, and judgment ordered to be entered for the plaintiffs, Messrs. Lindsay. 2 Q. B. Div. 96. This appeal was then brought.

CAIRNS, L. Ch.³ My lords, you have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My lords, in discharging that duty your lordships can do no more than apply rigorously the settled and well-known rules of law. Now, with regard to the title to personal property, the settled and well-known rules of law may, I take it, be thus expressed:

By the law of our country the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he

* Concurring opinions by Lord Hatherley and Lord Penzance are omitted.

obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title: If it turns out that the chattel has come into the hands of the person who professed to sell it, by a de facto contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods or of the chattel to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

My lords, the question, therefore, in the present case, as your lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the meantime, Blenkarn might have conveyed a good title for valuable consideration to the present appellants.

Now, my lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract. There is nothing else which could have passed the property. The second observation is this: Your lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done; the whole history of the whole transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally; everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my lords, discharging that duty and answering that inquiry, what the jurors have found is, in substance, this: It is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was

addressed by the respondents; that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well known and solvent house of Blenkiron & Co., doing business in the same street. My lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to and intended for, not himself, but the firm of Blenkiron & Co. Now, my lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my lords, is this: that your lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence. My lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which was attempted to be given to the appellants was a title which could not be given to them.

My lords, I therefore move your lordships that this appeal be dismissed with costs, and the judgment of the court of appeal affirmed. Judgment appealed from affirmed, and appeal dismissed, with costs.

3. MISTAKE AS TO NATURE OF SUBJECT-MATTER OF CONTRACT

(A) Mistake as to Existence of Subject-Matter

COUTURIER et al. v. HASTIE et al.

(House of Lords, 1856. 5 H. L. Cas. 673.)

The plaintiffs were merchants at Smyrna; the defendants were corn factors in London; and this action was brought to recover from them the price of a cargo of Indian corn, which had been shipped at Salonica, on board a vessel chartered by the plaintiffs for a voyage to England, and had been sold in London by the defendants in error, upon a *del credere* commission. The purchaser, under the circumstances hereafter stated, had repudiated the contract.

In January, 1848, the plaintiffs chartered a vessel at Salonica, to bring a cargo of 1180 quarters of corn to England. On the 8th of February a policy of insurance was effected on "corn, warranted free from average, unless general, or the ship be stranded." On the 22d of that month, the master signed a bill of lading, making the corn deliverable to the plaintiffs, or their assigns, "he or they paying freight, as per charter-party, with primage and average accustomed." On the 23d February the ship sailed on the homeward voyage. On the 1st May, 1848, Messrs. Bernouilli, the London agents of the plaintiffs, and the persons to whom the bill of lading had been indorsed, employed the defendants to sell the cargo, and sent them the bill of lading, the charter-party, and the policy of insurance, asking and receiving thereon an advance of £600.

On the 15th May the defendants sold the cargo to A. B. Callander, who signed a bought note, in the following terms: "Bought of Hastie & Hutchinson, a cargo of about 1,180 (say eleven hundred and eighty) quarters of Salonica Indian corn, of fair average quality when shipped per the *Kezia Page*, Captain *Page*, from Salonica; bill of lading dated twenty-second February, at 27s. (say twenty-seven shillings) per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders; measure to be calculated as customary; payment at two months from this date, or in cash, less discount, at the rate of five per cent. per annum for the unexpired time, upon handing shipping documents."

In the early part of the homeward voyage, the cargo became so heated that the vessel was obliged to put into Tunis, where, after a survey and other proceedings, regularly and bona fide taken, the cargo was, on the 22d April, unloaded and sold. It did not appear that

either party knew of these circumstances at the time of the sale. The contract having been made on the 15th of May, Mr. Callander, on the 23d of May, wrote to Hastie & Hutchinson: "I repudiate the contract of the cargo of Indian corn, per the *Kezia Page*, on the ground that the cargo did not exist at the date of the contract, it appearing that the news of the condemnation and sale of this cargo at Tunis, on the 22d April, was published at Lloyds, and other papers, on the 12th instant, being three to four days prior to its being offered for sale to me."

The plaintiffs afterwards brought this action. The declaration was in the usual form. The defendants pleaded several pleas, of which the first four are not now material to be considered. The fifth plea was that before the sale to Callander, and whilst the vessel was on the voyage, the plaintiffs sold and delivered the corn to other persons, and that since such sale the plaintiffs never had any property in the corn or any right to sell or dispose thereof, and that Callander on that account repudiated the sale, and refused to perform his contract, or to pay the price of the corn. Sixthly, that before the defendants were employed by the plaintiffs, the corn had become heated and greatly damaged in the vessel, and had been unloaded by reason thereof, and sold and disposed of by the captain of the said vessel on account of the plaintiffs at Tunis, and that Callander, for that reason, repudiated the sale, &c.

The cause was tried before Mr. Baron Martin, when his lordship ruled that the contract imported that at the time of the sale the corn was in existence as such, and capable of delivery, and that, as it had been sold and delivered by the captain before this contract was made, the plaintiffs could not recover in the action. He therefore directed a verdict for the defendants. The case was afterwards argued in the court of exchequer before the Lord Chief Baron, Mr. Baron Parke, and Mr. Baron Alderson, when the learned judges differed in opinion, and a rule was drawn up directing that the verdict found for the defendants should be set aside on all the pleas, except the sixth, and that on that plea judgment should be entered for the plaintiffs, non obstante veredicto. That the defendants should be at liberty to treat the decision of the court as the ruling at *nisi prius*, and to put it on the record and bring a bill of exceptions. 8 Exch. 40. This was done, and the lord chief baron sealed the bill of exceptions, adding, however, a memorandum to the effect that he did so as the ruling of the court, but that his own opinion was in opposition to such ruling.

The case was argued on the bill of exceptions in the exchequer chamber, before Justices Coleridge, Maule, Cresswell, Wightman, Williams, Talfourd and Crompton who were unanimously of opinion that the judgment of the court of exchequer ought to be reversed. 9 Exch. 102. The present writ of error was then brought.

The judges were summoned and Mr. Baron Alderson, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. Justice Wil-

liams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Willes, and Mr. Baron Bramwell attended.

CRANWORTH, L. Ch. My lords, this case has been very fully and ably argued on the part of the plaintiffs in error, but I understand from an intimation which I have received that all the learned judges who are present, including the learned judge who was of a different opinion in the court of exchequer, before the case came to the exchequer chamber, are of opinion that the judgment of the court of exchequer chamber sought to be reversed by this writ of error was a correct judgment, and they come to that opinion without the necessity of hearing the counsel for the defendants in error. If I am correct in this belief, I will not trouble the learned counsel for the defendants in error to address your lordships, because I confess, though I should endeavor to keep my mind suspended till the case had been fully argued, that my strong impression in the course of the argument has been, that the judgment of the court of exchequer chamber is right. I should therefore simply propose to ask the learned judges whether they agree in thinking that that judgment was right. [The judges consulted together for a few minutes, at the end of which time]

Mr. Baron ALDERSON said: My lords, her majesty's judges are unanimously of opinion that the judgment of the exchequer chamber was right, and that the judgment of the court of exchequer was wrong; and I am also of that opinion myself now, having been one of the judges before whom the case came to be heard in the court of exchequer.

The LORD CHANCELLOR. My lords, that being so, I have no hesitation in advising your lordships, and at once moving that the judgment of the court below should be affirmed. It is hardly necessary, and it has not ordinarily been usual, for your lordships to go much into the merits of a judgment which is thus unanimously affirmed by the judges who are called in to consider it, and to assist the house in forming its judgment. But I may state shortly that the whole question turns upon the construction of the contract which was entered into between the parties. I do not mean to deny that many plausible and ingenious arguments have been pressed by both the learned counsel who have addressed your lordships, showing that there might have been a meaning attached to that contract different from that which the words themselves import. If this had depended not merely upon construction of the contract but upon evidence, which, if I recollect rightly, was rejected at the trial, of what mercantile usage had been, I should not have been prepared to say that a long-continued mercantile usage interpreting such contracts might not have been sufficient to warrant, or even to compel, your lordships to adopt a different construction. But, in the absence of any such evidence, looking to the contract itself alone, it appears to me clearly that what the parties contemplated—those who bought and those who sold—was that there was an existing something to be sold and bought, and if sold and bought then the benefit of in-

insurance should go with it. I do not feel pressed by the latter argument, which has been brought forward very ably by Mr. Wilde, derived from the subject of insurance. I think the full benefit of the insurance was meant to go as well to losses and damage that occurred previously to the 15th of May as to losses and damage that occurred subsequently, always assuming that something passed by the contract of the 15th of May. If the contract of the 15th of May had been an operating contract, and there had been a valid sale of a cargo at that time existing, I think the purchaser would have had the benefit of insurance in respect of all damage previously occurring. The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased.

No such thing existing, I think the court of exchequer chamber has come to the only reasonable conclusion upon it, and consequently that there must be judgment given by your lordships for the defendants in error. Judgment for the defendants in error, with costs.

(B) Mistake as to Identity of Subject-Matter

IRWIN v. WILSON.

(Supreme Court of Ohio, 1887. 45 Ohio St. 426, 15 N. E. 209.)

MINSHALL, J.,⁴ * * * From the facts found by the court it appears that the defendant, being the owner of a tract of land in the state of Iowa, proposed, by his agent, to exchange it for the house and lot of the plaintiff, in the town of Kenton. Both were well acquainted with the property of the plaintiff; but, being uninformed as to the land in Iowa, the agent of the defendant procured a conveyance, and, at his suggestion, he and the plaintiff went to see one Pugh, though a stranger to both of them, residing in the county where they did, the agent saying that he understood that Pugh was acquainted with the land. On arriving at Pugh's, he informed them that he had seen the land; that he had been on it the year before, and that it was good, dry, tillable land, near the county-seat; that it was worth \$10 an acre when he saw it, and would then be worth more. In a few days afterwards, the agreement for the exchange was made, and executed by the plaintiff, conveying his house and lot to the defendant, who conveyed to the plaintiff his land in Iowa containing 80 acres, and also made and delivered to the plaintiff two notes amounting to \$700, secured by mort-

⁴The statement of facts and a portion of the opinion are omitted.

gage on the house and lot conveyed by the plaintiff, as the equivalent of the supposed difference in the value of the lands exchanged. In a few months afterwards, the plaintiff discovered that the land in Iowa was not such as it had been described by Pugh; that it was unfit for cultivation, being wet and marshy, and worth not more than three dollars an acre. The error arose from the fact that Pugh was mistaken in the ownership of the land he had seen; the land he had seen and described to the plaintiff and the agent of the defendant, was such as he had described it to be, but was not the land of the defendant, though he thought it was. The mistake was in the identity of the land seen and described by Pugh.

Thereupon the plaintiff offered to rescind, which was refused by the defendant. The refusal is placed, not upon the ground that he cannot be restored to his former condition by the plaintiff, but that, upon the facts as found, there is no ground for rescission; there being, as claimed, no mutual mistake, and no fraud found by the court. While no fraud is found by the court, does it not, however, clearly, if not necessarily, follow from the circumstances under which the exchange was made, that there was a mutual mistake of the parties as to the character and value of the lands in Iowa? We think it does. Both parties were in ignorance as to the true character of the land of the defendant. If it had been otherwise, the court could not have found that there was no fraud. It found that the plaintiff believed and relied on the information given by Pugh; and if the defendant, by his agent, was acting in good faith, he must have done the same thing; for it will hardly be affirmed by any one that, under the circumstances of this case, he could without fraud have concluded the exchange, knowing that the land was not such as it had been described by Pugh, for he must have known, if he knew anything, that the plaintiff believed what was said to him by the person to whom he had taken him for information. He knew it from the fact that the plaintiff concluded the agreement for an exchange on the basis of that information. So that, under the circumstances, it would be perilous for the defendant to claim that neither he nor his agent believed the statements of Pugh as to the character of the Iowa land; for, if that had been the fact, he could not have concluded the exchange on the basis of the information being true, without perpetrating a fraud on the plaintiff, whether he made any positive representations or not. *Pol. Cont.* (Wald's Ed.) 429. But his belief or disbelief as to this is not a matter of mere argument, for, while there is no specific finding on the question, it is made certain by the pleadings.

In answering the averments of the petition, the defendant affirms in his pleading that the description given of the land by Pugh was not untrue, and that there was no mistake in the identity of the land seen by him. Therefore, unless we may conclude that he had one belief

as to the matter when he concluded the exchange, and another when he filed his answer,—a thing quite impossible if not absurd,—we may safely conclude that, as a fact apparent on the record, he had the same belief as to the accuracy of the statements made by Pugh that the plaintiff had. But the positive findings of the court are that Pugh was mistaken as to the identity of the land, and that that owned by the defendant was not of the description given by him. So that the only question that remains is, not whether there was a mutual mistake in regard to the land, but whether it is such a one as under the circumstances entitles the plaintiff to a rescission. Here we must observe that the mistake arose not from a mistaken opinion of Pugh as to the character of the defendant's lands; for, if he had in fact seen the land, and simply erred in his opinion as to its character and value, a different question might have been presented. It is a matter of common knowledge that opinions will differ in this regard; and the plaintiff, in relying on the statements of P. as to the quality of the defendant's land, might be held as assuming the possibility of a mistake in his judgment as to this. But Pugh did not see the land of defendant; he was mistaken in its identity. Such errors are less frequent than the former; and a fault could hardly be imputed to any one in not anticipating an error of this kind. 2 Pom. Eq. Jur. § 852.

It is against mistakes of this character that the courts have been most prompt to relieve; and not only for the reason that they may happen where the greatest caution is observed, but also, that, as a matter of law, where they do occur, no real contract is formed. Thus, in *Wheadon v. Olds*, 20 Wend. (N. Y.) 174, a sale had been made of a quantity of oats in bulk, upon an estimate of the quantity, after a portion had been measured. The estimate of the quantity unmeasured was made by a comparison of the measured with the unmeasured pile, and the purchaser agreed to take them at the estimate, "hit or miss," as to quantity, and paid for them at the estimated quantity. The oats did not hold out within about 300 bushels of the quantity estimated and paid for. It was afterwards discovered that a mistake had been made in regard to the quantity measured, which formed the basis of the estimate, in counting the tallies as bushels, instead of half-bushels, as they were in fact. Upon these facts the plaintiff was allowed to recover back the money paid for the entire quantity which he did not receive. The case was followed in *Coon v. Smith*, 29 N. Y. 393, where it was cited as showing "the length courts will go in disregard of contracts founded in a mistake of material facts, and in the protection of rights prejudiced thereby." There an agreement between adjoining land-owners, by which a corner had been erroneously fixed by reason of a miscount of the chain-men, was held not to be binding, although it had been acted on by both parties before the mistake was discovered. The error of the chain-men, being unknown to the parties, invalidated the agreement fixing the corner.

So in *Gardner v. Lane*, 9 Allen (Mass.) 492, 85 Am. Dec. 779, W. had agreed to sell G. 135 barrels of No. 1 mackerel. By mistake of the parties in making the delivery, some two months afterwards, part of the barrels marked to indicate delivery were No. 3 mackerel, and part were salt. In replevin by the purchaser against a creditor of the seller who had levied on the property, it was held that no property passed in the barrels so marked by mistake, even as to those containing No. 3 mackerel; the court saying: "They are not included within the contract of sale; the vendor has not agreed to sell, nor the vendee to purchase them; the subject-matter of the contract has been mistaken, and neither party can be held to an execution of the contract to which he has not given his assent. It is a case where, through mutual misapprehension, the contract of sale is incomplete." See, also, the same case, 12 Allen (Mass.) 39, where the ruling, when it was again brought before the court, was adhered to.

The principle of these cases is quite as applicable to contracts for the sale and conveyance of land, induced by the mutual mistake of the parties, as to contracts concerning personalty; and the equitable relief of rescission will be granted, where such mistakes have intervened, quite as readily in the one case as in the other, if not more so. Pol. Cont. (Wald's Ed.) 430, and cases cited in the notes; 2 Pom. Eq. Jur. § 869; *Crowe v. Lewin*, 95 N. Y. 426; *Lawrence v. Staigg*, 8 R. I. 256; *Gilroy v. Alis*, 22 Iowa, 174; *Irick v. Fulton*, 3 Grat. (Va.) 193; *Barfield v. Price*, 40 Cal. 535; *Knapp v. Fowler*, 30 Hun (N. Y.) 513; *Rhode Island v. Massachusetts*, 13 Pet. 23, 10 L. Ed. 41; and *Mulvey v. King*, 39 Ohio St. 491, 495 (Upson, J.).

In the case presented by the record before us, the mistake was in the identity of the land that had been seen and described by Pugh. He supposed it to be the land about which the parties were contracting and desired information; the error was in this, and not in the description of the land he had seen; hence the parties, in acting upon his information, acted upon the same error of fact; and, upon principle, the case is not different from what it would have been had they gone to see the land described by P., supposing it to be the land of the defendant; and that such an error would, on the ground of mutual mistake, have avoided the contract, is, we think, too plain to admit of a question. In treating of the subject of mistake, Mr. Pollock, in his work on Contracts, observes: "It may happen that there does exist a common intention, which, however, is founded on an assumption made by both parties as to some matter of fact essential to the agreement. In this case the common intention must stand or fall with the assumption on which it is founded. If the assumption is wrong, the intention of the parties is from the outset incapable of taking effect. But for their common error it would never have been formed, and it is treated as nonexistent. Here there is in some sense an agreement, but it is nullified in its inception by the nullity of the thing agreed upon; and it is

hardly too artificial to say that there is no real agreement. The result is the same as if the parties had made an agreement expressly conditional on the existence at the time of the supposed state of facts; which state of facts not existing, the agreement destroys itself." Pol. Cont. 412. See, also, Fonbl. Eq. marg. p. 120; Kerr, Fraud & M. 431.

The case of *Crist v. Dice*, 18 Ohio St. 536, on which much reliance is placed by counsel for defendant in error, is plainly distinguishable from this one. It was an action for rescission on the ground of fraud. The defendant claimed, and introduced evidence that, though he had exhibited to the plaintiff a letter from a stranger, representing the land as favorably situated, and of good quality, and stated to the plaintiff that he had bought the land on the strength of this description he refused to vouch for its truth, and advised the plaintiff to go and see for himself. The plaintiff declined to take the trouble, and agreed to make the exchange at his own risk. There was no finding of facts, and the case was disposed of on the assumption that the court below may have believed the defendant's version; and, adopting it, the plaintiff had, of course, no ground for relief. This sufficiently distinguishes the case from the one presented by this record. We are unable to perceive upon what principle of justice the plaintiff should be denied the relief he asks. The information upon which he acted had not been obtained in a casual meeting with Mr. Pugh. The defendant, by his agent, having suggested that P. was acquainted with the land, and taken the plaintiff to inquire of him about it, is estopped from saying that P. was a stranger, and he had no right to rely on what he said. Moreover, the error did not occur from any bad faith in P., but from a mistake that may happen to the most careful of men. As the mistake arose from an innocent error in all the parties, natural justice forbids that the loss of one arising out of it should be the gain of the other.

Judgment reversed, and judgment rendered for the plaintiff in error, rescinding the exchange made by the parties.

(C) Mistake as to Nature and Essential Qualities of Subject-Matter

WOOD v. BOYNTON et al.

(Supreme Court of Wisconsin, 1885. 64 Wis. 263, 25 N. W. 42, 54 Am. Rep. 610.)

TAYLOR, J. This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of \$1,000. The case was tried in the circuit court, and

after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and after judgment was entered in favor of the defendants, appealed to this court.

The defendants are partners in the jewelry business. On the trial it appeared that on and before the twenty-eighth of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about \$700. After hearing this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows: "The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into the store to get a little pin mended, and I had it in a small box,—the pin,—a small ear-ring; * * * this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?' I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the twenty-eighth of December, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz, and he says, 'Well, yes; what did I offer you for it?' and I says, 'One dollar;' and he stepped to the change drawer and gave me the dollar, and I went out."

In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg,—worn pointed at one end; it was nearly straw color,—a little darker." She also testified that before this action was commenced she tendered the defendants \$1.10, and demanded the return of the stone, which they refused. This is substantially all the

evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, and it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing, upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. By such sale the title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons of the purchase money with interest, and a demand of a return of the stone to her. Unless such tender and demand revested the title in the appellant, she cannot maintain her action.

The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold,—a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its in-

trinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. *Kennedy v. Panama, etc., Mail Co.*, L. R. 2 Q. B. 580.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. *Kennedy v. Panama, etc., Mail Co.*, *supra*, 587; *Street v. Blay*, 2 Barn. & Adol. 456; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Gurney v. Womersley*, 4 El. & Bl. 133; *Ship's Case*, 2 De G. J. & S. 544. Suppose the appellant had produced the stone, and said she had been told it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her \$500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond. See *Street v. Blay*, *supra*.

It is urged, with a good deal of earnestness, on the part of the counsel for the appellant that, because it has turned out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made. When this sale was made the value of the thing sold was open to the investigation of both parties, neither knowing its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after-investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale we need not consider. See *Stettheimer v. Killip*, 75 N. Y. 287; *Etting v. Bank of U. S.*, 11 Wheat. 59, 6 L. Ed. 419.

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court

of equity might seize upon to avoid the sale. The following cases show that, in the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Lambert v. Heath*, 15 Mees. & W. 487; *Bryant v. Pember*, 45 Vt. 487; *Kuelkamp v. Hidding*, 31 Wis. 503-511. However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

The judgment of the circuit court is affirmed.

4. EFFECT OF MISTAKE—REMEDIES

See *Foster v. Mackinnon*, *supra*, page 166; *Cundy v. Lindsay*, *supra*, page 169; *Couturier v. Hastie*, *supra*, page 173; *Irwin v. Wilson*, *supra*, page 176.

II. Misrepresentation⁵

GLOBE MUT. LIFE INS. ASS'N v. WAGNER.

(Supreme Court of Illinois, 1900. 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169.)

Action by Dora Wagner against the Globe Mutual Life Insurance Association. From judgment of the appellate court (90 Ill. App. 444) affirming judgment for plaintiff, defendant appeals. Affirmed.

Appellee, Dora Wagner, recovered a judgment of \$250 in a suit in assumpsit in the superior court of Cook county against appellant, the Globe Mutual Life Insurance Association of Chicago, on a policy of insurance issued to her on the life of her son Richard Wagner. The association appealed to the appellate court, where the judgment of the superior court was affirmed, and now prosecutes this further appeal; the appellate court having certified that the cause involves questions of law of such importance as that it should be passed upon by the supreme court.

WILKIN, J. The chief ground urged by appellant for a reversal of the judgment of the appellate court is the falsity of the answer to one of the questions appearing in the medical examination of the insured. On the back of the application made by appellee, in what purports to be the medical examination of the insured, this question and

⁵ For discussion of principles, see *Clark on Contracts* (2d Ed.) §§ 135-138.

answer appear: "Q. How many brothers dead? Ans. None." The medical examination is certified to by the medical examiner, as follows: "I certify that I have this 7th day of October, 1895, made a personal examination of the above-named person (Richard Wagner), and that the above answers are in my own handwriting, and that the signature of the applicant or person examined was written in my presence. M. J. McKenna, M. D."

Preceding the medical examiner's certificate, and immediately at the end of the series of questions and answers referred to in the certificate, of which the quoted question is one, appears the following language, to which is affixed the signature of Richard Wagner, the insured: "I hereby declare and warrant that the answers to the above questions, and the statements made in the application on the other side hereof, are true, and were written by me or by my proper agent, and that said answers and statements, together with this warranty, shall form the basis of any contract of insurance that may be entered into between me and the Globe Mutual Insurance Association, and that if a contract of insurance is issued it shall not be binding on the company unless, upon its date and delivery, I shall be in sound health."

On the front side of the sheet, on the back of which is the medical examination and statement signed, as above, by the insured, is the application by appellee for the policy, and over her signature appears the following: "I hereby make application for the policy described above, and as an inducement to the association to issue a policy, and as a consideration therefor, make the agreement as to agency, and all other agreements and warranties contained in the medical examination, as fully as if I had signed the same."

It appears from the evidence that a brother of the insured died in London, England, more than four years prior to the date of the application for insurance in this case, but there is no evidence tending to show that the insured ever knew of his brother's death. Appellant asserts, however, that, whether he knew of it or not, the statement that none of his brothers was dead is a warranty, and being untrue, avoids the policy. Appellee contends that the statement, though false, is not a warranty, but a mere representation, which, unless material, would not avoid the policy.

In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that the insured or the appellee took a life policy with the distinct understanding that it should be void if any statements made in the medical examination should be false, whether the insured was conscious of the falsity thereof or not. *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447. Whether or not the deceased knew of the death of his brother at the time of the application for insurance was a question for the jury, and no evidence of such knowledge appears in the record. To hold that, as a precedent to any binding contract, he should guaranty absolutely that none of his brothers were dead would be unreasonable, in the

absence of a more explicit stipulation than here appears. It not infrequently happens that a man loses trace of all or a part of his relations, and to hold him to absolutely guaranty that they were living, in order that he might obtain insurance, would sometimes be impossible, and almost absurd.

What is said in *Moulor v. Insurance Co.*, supra, is peculiarly applicable to the case at bar. In that case the insured made a false statement as to his having had certain diseases, and "warranted that the above are fair and true answers." The court say: "The entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were in any respect untrue. What was meant by 'true' and 'untrue' answers? In one sense, that only is true which is conformable to the actual state of things. In that sense a statement is untrue which does not express things exactly as they are, but, in another and broader sense, the word 'true' is often used as a synonym of honest; sincere; not fraudulent. Looking at all the clauses in the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant as a condition precedent to any binding contract was that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made fair and true answers." In that case the untrue statements were held to be representations, and not warranties, and we think, on the same reasoning, the answer here in question should be so held, and, in the absence of proof by the company of fraud or intentional misstatement on the part of the insured, the policy was not rendered invalid merely because the answer proved to be false.

We are satisfied the court below committed no reversible error, and the judgment of that court will be affirmed. Judgment affirmed.

X
III. Fraud *

1. FRAUD IS A FALSE REPRESENTATION

GRIGSBY v. STAPLETON.

(Supreme Court of Missouri, 1888. 94 Mo. 423, 7 S. W. 421.)

BLACK, J. This was a suit in two counts. The first declares for the contract price of 100 head of cattle sold by the plaintiff to the defendant; the second seeks to recover the value of the same cattle. The contract price, as well as the value, is alleged to have been \$3,431.25. The answer is—First, a general denial; second, fraudulent representation as to the health and condition of the cattle; third, fraudulent concealment of the fact that they had the Spanish or Texas fever; fourth, tender of their value in their diseased condition.

Plaintiff purchased 105 head of cattle at the stock-yards in Kansas City on Friday, the 25th July, 1884, at \$3.60 per cwt. He shipped them to Barnard on Saturday. Mr. Ray, plaintiff's agent, attended to the shipment, and accompanied the cattle. Ray says it was reported in the yards, before he left Kansas City, that the cattle were sick with Texas fever; some persons said they were sick, and some said they were not. When the cattle arrived at Barnard, Ray told the plaintiff of the report, and that the cattle were in bad condition; that one died in the yards at Kansas City, before loading, and another died in the cars on the way. On Sunday morning the plaintiff started with them to his home. After driving them a mile or so, he says he concluded to and did drive them back to the yards, because they were wild. One of them died on this drive, and two more died in the pen at Barnard before the sale to defendant. There is much evidence tending to show that the plaintiff drove cattle back, because he was afraid to take them to his neighborhood, and that he knew they were diseased, and dying from the fever. He made no disclosure of the fact that the cattle were sick to defendant, nor that they were reported to have the fever. Defendant bargained for the cattle on Sunday afternoon, and on Monday morning completed the contract at \$3.75 per cwt., and at once shipped them to Chicago. Thirty died on the way; twenty were condemned by the health officer. It is shown beyond all question that they all had the Texas fever.

The court, by the first instruction given at the request of the plaintiff, told the jury that if "plaintiff made no representations to defendant as to the health or condition of said cattle to influence defendant to believe said cattle were sound or in healthy condition, but, on the

* For discussion of principles, see Clark on Contracts (2d Ed.) §§ 139, 140.

contrary, defendant bought said cattle on actual view of the same, and relying on his own judgment as to their health and condition, then the jury will find for the plaintiff; * * * and, if the cattle were bought by the defendant in the manner above stated it makes no difference whether said cattle, or any of them, were, at the time of said sale, affected with Texas fever or other disease, or whether plaintiff did or did not know of their being so diseased, as, under such circumstances, he would buy at his own risk and peril."

Caveat emptor is the general rule of the common law. If defects in the property sold are patent, and might be discovered by the exercise of ordinary attention, and the buyer has an opportunity to inspect the property, the law does not require the vendor to point out defects. But there are cases where it becomes the duty of the seller to point out and disclose latent defects. Parsons says the rule seems to be that a concealment or misrepresentation as to extrinsic facts which affect the market value of the thing sold, is not fraudulent, while the same concealment of defects in the articles themselves would be fraudulent. 2 Pars. Cont. (6th Ed.) 775. When an article is sold for a particular purpose, the suppression of a fact by the vendor, which fact makes the article unfit for the purposes for which it was sold, is a deceit; and, as a general rule, a material latent defect must be disclosed when the article is offered for sale, or the sale will be avoided. 1 Whart. Cont. § 248. The sale of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud, when the fact of the disease is not disclosed. Cooley, Torts, 481. Kerr says: "Defects, however, which are latent, or circumstances materially affecting the subject-matter of a sale, of which the purchaser has no means, or at least has no equal means, of knowledge, must, if known to the seller, be disclosed." Kerr, Fraud & M. (Ed. by Bump,) 101.

In *Cardwell v. McClelland*, 3 Sneed (Tenn.) 150, the action was for fraud in the sale of an unsound horse. The court had instructed that if the buyer relies upon his own judgment and observations, and the seller makes no representations that are untrue, or says nothing, the buyer takes the property at his own risk. This instruction was held to be erroneous, the court saying, if the seller knows of a latent defect in the property that could not be discovered by a man of ordinary observation, he is bound to disclose it. In *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476, the defendants, through their agent, sold a flock of sheep to the plaintiff. Soon after the sale a disease known as the "scab" made its appearance among the sheep. It was in substance said, had the defendants made the sale in person, and known the sheep were diseased, it would have been their duty to have informed the purchaser; and the defendants were held liable for the deceit. In the case of *McAdams v. Cates*, 24 Mo. 223, the plaintiff made an exchange or swap for a filly, unsound from the loss of her teeth. The court, after a careful review of the authorities as

they then stood, announced this conclusion: "If the defect complained of in the present case was unknown to the plaintiff, and of such a character that he would not have made the exchange had he known of it, and was a latent defect such as would have ordinarily escaped the observation of men engaged in buying horses, and the defendant, knowing this, allowed the plaintiff to exchange without communicating the defect, he was guilty of a fraudulent concealment, and must answer for it." This case was followed, and the principle reasserted, in *Barron v. Alexander*, 27 Mo. 530. *Hill v. Balls*, 2 Hurl. & N. 299, seems to teach a different doctrine; but the cases in this court, supported as they are, must be taken as the established law of this state.

There is no claim in this case that defendant knew these cattle were diseased. It seems to be conceded on all hands that Texas fever is a disease not easily detected, except by those having had experience with it. The cattle were sold to the defendant at a sound price. If, therefore, plaintiff knew they had the Texas fever, or any other disease materially affecting their value upon the market, and did not disclose the same to the defendant, he was guilty of fraudulent concealment of a latent defect. It is not necessary to this defense that there should be any warranty or representations as to health or condition of the cattle. Indeed, so far as this case is concerned, if the cattle had been pronounced by some of the cattle-men to have the Texas fever, and, after knowledge of that report came to plaintiff, some of them to his knowledge died from sickness, then he should have disclosed these facts to the defendant. They were circumstances materially affecting the value of the cattle for the purposes for which they were bought, or for any other purpose, and of which defendant, on all the evidence, had no equal means of knowledge. To withhold these circumstances was a deceit, in the absence of proof that defendant possessed such information.

It follows that the first instruction is radically wrong, and that the second given at the request of the plaintiff is equally vicious. The judgment is reversed, and the cause remanded.

2. CHARACTER OF REPRESENTATION—OPINION

GORDON v. PARMELEE et al.

(Supreme Judicial Court of Massachusetts, 1861. 2 Allen, 212.)

Two actions of contract, tried and argued together, on promissory notes given by the defendants in payment for a farm and a detached piece of woodland.

At the trial in the superior court, before Rockwell, J., it appeared that the bargain for the land was made upon the premises, and that the defendants had viewed the same with reference to the purchase, and passed over the wood lot at several times before the purchase, in different directions.

The defendants offered to show that the treaty for the purchase was made when the land was covered with snow, and that the plaintiffs falsely represented that the farm was of a soil, and a capacity for productiveness and the keeping of stock, greatly superior to what it was in fact; and that they had no means of judging of the same except from the representations of the plaintiffs, on which they relied, and were thereby induced to make the purchase; but the evidence was excluded. They also offered to show that the wood lot was so rough and uneven that its actual extent could not be seen from any point, and that the plaintiffs falsely pointed out boundaries as the true ones which included lands of adjoining owners, and falsely represented that a portion thereof lying under a ledge, and so situated that no judgment as to its quantity approaching correctness could be formed by inspection, contained fifty acres, knowing that in fact it only contained twenty-eight acres.

The defendants claimed a right to recoup in damages for all these false representations; but the court ruled that they could recoup only for the value of the land lying between the boundaries pointed out and the true bounds, and not for false representations as to the number of acres, and if no false representations were made as to the boundaries, no deduction should be made from the notes.

The plaintiffs offered in evidence the declaration in an action brought by the defendant Parmelee against the plaintiffs, to recover damages for certain specified false representations alleged to have been made by them in selling this land, and afterwards discontinued, for the purpose of showing that the claim then made by Parmelee was less than the claim now set up by him. This was objected to, unless it should also be shown that Parmelee dictated or had knowledge of the precise allegations contained in the declaration; but the court allowed the evidence to be introduced.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

BIGELOW, C. J. The alleged false statements concerning the productiveness of the land and its capacity to furnish support for cattle constituted no defence to the notes. They fall within that class of affirmations which, although known by the party making them to be false, do not, as between vendor and vendee, afford any ground for a claim of damages either in an action on the case for deceit or by way of recoupment in a suit to recover the purchase money. They come within the principle embodied in the maxim of the civil law, "*Simplex commendatio non obligat*." Assertions concerning the value of property which is the subject of a contract of sale, or in regard to its qualities

and characteristics, are the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries for the purpose of ascertaining the real condition of the property.

Affirmations concerning the value of land, or its adaptation to a particular mode of culture, or the capacity of the soil to produce crops or support cattle, are, after all, only expressions of opinion or estimates founded on judgment, about which honest men might well differ materially. Although they might turn out to be erroneous or false, they furnish no evidence of any fraudulent intent. They relate to matters which are not peculiarly within the knowledge of the vendor, and do not involve any inquiry into facts which third persons might be unwilling to disclose. They are, strictly speaking, *gratis dicta*. The vendee cannot safely place any confidence in them; and if he does, he cannot make use of his own want of vigilance and care in omitting to ascertain whether they were true or false as the basis of his claim for damages in reduction of the amount which he agreed to pay for the property.

The representations concerning the quantity of land which formed the subject of the contract come within the same principle. The vendors pointed out to the vendees the true boundaries of the land which they sold. This fact is established by the verdict of the jury under the instructions which were given at the trial. The defendants had therefore the means of ascertaining the precise quantity of land included within the boundaries. They omitted to measure it, or to cause it to be surveyed. By the use of ordinary vigilance and attention, they might have ascertained that the statement concerning the number of acres, on which they placed reliance, was false. They cannot now seek a remedy for placing confidence in affirmations which, at the time they were made, they had the means and opportunity to verify or disprove. *Sugd. Vend.* 6, 7; *Scott v. Hanson*, 1 Sim. 13; *Medbury v. Watson*, 6 Metc. 246, 39 Am. Dec. 726; *Brown v. Castles*, 11 Cush. 348.

The declaration in the former suit was rightly admitted. It was in the nature of an admission by the defendants of the nature and amount of damages which they claimed of the present plaintiffs in reduction of the amount due on the notes. The declaration was not a mere technical statement of a cause of action by an attorney, but it contained specific averments of the representations which the defendants alleged to be false, and which must have been derived from them. It was therefore the statement of their agent, while employed and acting within the scope of his agency. *Currier v. Silloway*, 1 Allen, 19.

Exceptions overruled.

3. RIGHT TO RELY ON STATEMENTS

STEVENS v. LUDLUM.

(Supreme Court of Minnesota, 1891. 46 Minn. 160, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210.)

Action by J. W. Stevens, plaintiff, against John Ludlum, trading as the New York Pie Company, defendant, upon a bill of exchange drawn upon the company, and accepted by it by one White, as manager. Defendant interposed a general denial. On the trial plaintiff offered evidence tending to prove that defendant, Ludlum, had stated to representatives of Bradstreet's and Dun's Commercial Agencies, who had called upon him in their official capacity, that he was sole proprietor of the New York Pie Company, and the owner of valuable unincumbered real estate; that this information was communicated by the agencies to plaintiff, one of their subscribers, who in good faith acted thereon in extending credit to the company. Defendant admitted making the alleged statements to the commercial agencies, but denied having ever had any connection with the pie company. Judgment was ordered for plaintiff. From an order denying a new trial defendant appeals.

GILFILLAN, C. J. The facts found by the court below are sufficient to create an equitable estoppel against defendant as to the ownership of the concern doing business as the "New York Pie Company." To raise such an estoppel, it is not necessary that the representations should have been made with actual fraudulent intent. If he knows, or ought to know, the truth, and they are intentionally made under such circumstances as show that the party making them intended, or might reasonably have anticipated, that the party to whom they are made, or to whom they are to be communicated, will rely and act on them as true, and the latter has so relied and acted on them, so that to permit the former to deny their truth will operate as a fraud, the former is, in order to prevent the fraud, estopped to deny their truth. *Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846; *Beebe v. Wilkinson*, 30 Minn. 548, 16 N. W. 450. Nor need the representations be made directly to the party acting on them. It is enough if they were made to another, and intended or expected to be communicated as the representations of the party making them to the party acting on them, for him to rely and act on. "The representation may be intended for a particular individual alone, or for several, or for the public, or for any one of a particular class, or it may be made to A., to be communicated to B. Any one so intended by the party making the representation will be entitled to relief or redress against him, by acting on the representation to his damage." *Bigelow, Frauds*, 445.

If one act on a representation not made to nor intended for him, he will do so at his own risk. An instance of a right to act on a representation not made directly to the person acting on it, but intended for him, if he had occasion to act on it, is furnished by *Pence v. Arbuckle*, 22 Minn. 417. The representations a business man makes to a bank or commercial agency, especially to the latter, relating to his business or to his pecuniary responsibility, are among those expected to be communicated to others for them to act on. The business of a commercial agency is to get such information as it can relative to the business and pecuniary ability of business men and business concerns, and communicate it to such of its patrons as may have occasion to apply for it. Any one making representations to such an agency, relating to his business or the business of any concern with which he is connected, must know, must be held to intend, that whatever he so represents will be communicated by the agent to any patron who may have occasion to inquire. His representations are intended as much for the patrons of the agency, and for them to act on, as for the agency itself. When the representations so made are communicated, as those of the person making them, to a patron of the agency, and he relies and acts on them, he is in position to claim an estoppel.

The findings of fact in the case are fully sustained by the evidence. Order affirmed.

4. KNOWLEDGE OF FALSITY—RECKLESSNESS

STIMSON v. HELPS et al.

(Supreme Court of Colorado, 1886. 9 Colo. 33, 10 Pac. 290.)

The complaint sets out that on the sixth day of October, 1881, William Stimson leased to the defendants in error the S. W. $\frac{1}{4}$ of section 21, in township 1, range 70 west, in said county, for the period of four years and six months, for the purpose of mining for coal, under the conditions of said lease; that they had no knowledge of the location of the boundary lines of said tract at the time of the leasing, and that they so informed Stimson, the defendant in the case; that they requested Stimson to go with them and show them the boundary lines; that the defendant, pretending to know the lines bounding said land, and their exact locality, went then and there with plaintiffs, and showed and pointed out to them what he said was the leased land, and the boundary lines thereof, especially the north and south lines thereof; that plaintiffs not then knowing the lines bounding said land, nor the exact location thereof, and relying upon what the defendant then and

there pointed out to them as the leased land, and the lines thereof, then and there proceeded to work on the land pointed out, and sank shafts for mining coal thereon, and made sundry improvements thereon,—made buildings, laid tracks, etc.; that all the said work was done and labor performed and improvements made on the land pointed out by defendant to plaintiffs as the leased land, and that plaintiffs, relying upon the statements of defendant as aforesaid, and not knowing otherwise, believed they were performing the work, and making all the improvements on the land they had so leased, which they did by direction of the defendant; that while they were working on the said land Stimson was frequently present, and told the plaintiffs they were on his land, and received royalty from ore taken therefrom; that about April 10, 1882, they were notified to quit mining on said ground by the Marshall Coal Mining Company; that the land belonged to said company; that none of the said improvements were put on said leased land; and that they were compelled to quit work and mining thereon; that the improvements made by them were worth \$2,000; that Stimson falsely represented to them other and different lines than the true boundaries of said premises, and showed and pointed out to them other and different lands than the lands leased them, and thereby deceived them, and damaged them, in the sum of \$2,000. Issue joined, and trial to the court. Motion by defendant's counsel for judgment on the pleadings, and evidence overruled. Judgment for the plaintiffs in the sum of \$2,000, and costs.

ELBERT, J. The law holds a contracting party liable as for fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. Upon such representations so made the contracting party to whom they are made has a right to rely, nor is there any duty of investigation cast upon him. In such a case the law holds a party bound to know the truth of his representations. Bigelow, *Fraud*, 57, 60, 63, 67, 68, 87; Kerr, *Fraud & M.* 54 et seq.; 3 *Wait, Act. & Def.* 436. This is the law of this case, and, on the evidence, warranted the judgment of the court below.

The objection was made below, and is renewed here, that the complaint does not state sufficient facts to constitute a cause of action. Two points are made: (1) That the complaint does not allege that the defendant knew the representations to be false; (2) that it does not allege intent to defraud.

It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge falsely, and the law imputes a fraudulent intent. Kerr,

Fraud & M. 54 et seq., and cases cited; Bigelow, Fraud, 63, 84, 453; 3 Wait, Act. & Def. 438 et seq.; 2 Estee, Pr. 394 et seq. "Fraud" is a term which the law applies to certain facts, and where, upon the facts, the law adjudges fraud, it is not essential that the complaint should, in terms, allege it. It is sufficient if the facts stated amount to a case of fraud. Kerr, Fraud & M. 366 et seq., and cases cited; 2 Estee, Pl. 423. The complaint in this case states a substantial cause of action, and is fully supported by the evidence.

The action of the county court in refusing to allow the appellant to appeal to the district court after he had given notice of an appeal to this court, and time had been given in which to perfect it, cannot be assigned as error on this record. If it was an error, it was error not before, but after, the final judgment from which this appeal is taken.

The judgment of the court below is affirmed.

5. INTENTION

See *Stevens v. Ludlum*, supra, p. 192.

6. REPRESENTATION MUST DECEIVE

JAMES v. HODSDEN.

(Supreme Court of Vermont, 1874. 47 Vt. 127.)

REDFIELD, J.⁷ This action is to recover the consideration paid for interest in a certain invention or right to procure a patent for an improved knitting-needle. The theory of the case is that the sale was induced by fraud; that the property is worthless; and that the consideration has entirely failed. * * *

The charge of the court, "that it was not necessary that they should find that the plaintiff relied solely on the representations, but it was sufficient if they found the representations were so far relied on by the plaintiff as to constitute one of the inducements of the trade in question," we think sound and reasonable. Under the charge, the jury must have found that the plaintiff was deceived and defrauded; that he was, in fact, cajoled into a purchase of a patent-right interest of no

⁷ The statement of facts and a portion of the opinion are omitted.

value, and giving his notes for a large sum, by the false assertions and practices of the defendant and his conspirators. It is often said in the cases, that the false representations must have been such that without them the trade would not have been made. But it is never possible for any man, in the aggregate of inducements that effected the sale, to determine whether the result would have been attained with some of the inducements abated; nor should the guilty party seeking the benefit of a sale fraudulent in fact, and induced, in a measure, by his fraud and falsehood, be permitted to allege in excuse that the innocent party might have made the purchase if he had practiced less deceit, and his lies had been less flagrant. If he resorts to unlawful means and accomplishes a fraudulent purpose, the law will not stop to measure the force of such inducements. It is enough that the party was deceived and cheated, and the defendant's falsehood and fraudulent practices contributed to that end. "The misrepresentations must be in something material, in which the party relies and puts confidence, and he is misled and cheated." 1 Story, Eq. §§ 197, 203. If a party, induced by the several false and fraudulent declarations of two persons, different in time and character, purchases worthless property, it would not do to say, that because the trade might not have been made if only one falsehood had been uttered, and the purchase not wholly induced by either, therefore, he is without remedy or redress. If a fraud is accomplished, and the unlawful acts of the defendant contributed thereto, he is answerable.

The fraudulent acts of the defendant must, indeed, have worked an injury, or there could be no damages and no recovery. But if the wrong has been done, and the defendant is party to its infliction, the court will not apportion the penalties of guilt among offenders, nor divide spoil among highwaymen. * * * Judgment reversed.

7. EFFECT—REMEDIES

ROWLEY et al. v. BIGELOW et al.

(Supreme Judicial Court of Massachusetts, 1832. 12 Pick. 307, 23 Am. Dec. 607.)

Trover for 627 bushels of yellow corn, valued at 55 cents a bushel.

At the trial, before Wilde, J., it was proved by the plaintiffs, that on the 24th of May, 1830, the corn belonged to them and was in their possession, in the city of New York, on board the sloop Milan, of which S. Dunning, one of the plaintiffs, was master, and that it was measured and delivered on board the schooner Lion. They alleged that one William N. Martin, a merchant there, fraudulently obtained

possession of it by pretending to purchase it for cash; and it was proved that on the 25th of May he shipped it on board the *Lion*, consigned to the defendants at Boston, and that the vessel sailed in the afternoon of that day for Boston. On the 26th, Dunning, having ineffectually demanded payment for the corn, at Martin's counting-house, proceeded to Boston to reclaim it. He reached Boston before the arrival of the *Lion*, and on the 29th gave notice to the defendants, to whom by Martin's orders the corn was to be delivered, that Martin had fraudulently obtained it from the plaintiffs, and that they intended to repossess themselves of it. On the 30th, when the *Lion* had arrived in Boston harbour, Dunning boarded her and demanded of the master possession of the corn, giving him notice that Martin had obtained it fraudulently from the plaintiffs. The master notwithstanding delivered it to the defendants; after which Dunning demanded it of them and tendered them any freight or charges which they had paid. They refused to deliver the corn, and thereupon the suit was commenced.

In order to establish the fraud on the part of Martin, the plaintiff's relied on the depositions of C. A. Jackson and others, merchants in New York, who testified that Martin had made similar purchases of them about the same time, and under circumstances tending to show that he was insolvent, and that he knew it and had no reasonable expectation of paying for the merchandise according to his contract. The defendants objected to the admission of these depositions, but the judge permitted them to be read to the jury.

The defendants, to establish their right to hold the corn against the plaintiffs, offered in evidence a bill of lading, dated May 17th, 1830, signed by the master of the *Lion*, purporting to be for 2000 bushels of yellow corn shipped by Martin and consigned to the defendants; also an invoice corresponding to the bill of lading and purporting to be for 2000 bushels of corn consigned to the defendants for sale on the shipper's account, and signed by Martin; also a letter from Martin to the defendants dated May 17th (to which the bill of lading and invoice were annexed) advising that he valued on them in favor of Henry Bennett for \$1000, at ten days' sight, and directing them, if he had valued too much on this shipment, to charge it to some previous one, there being an existing account between Martin and the defendants. And it was proved that a bill drawn accordingly by Martin, was accepted by the defendants on the 20th of May and paid by them at maturity.

There was no evidence that the defendants had any knowledge of the fraudulent conduct of Martin, but it appeared that they received the bill of lading and invoice and accepted the draft in the usual course of business.

Upon this evidence the judge ruled, that the defendants had a good title to the property notwithstanding the fraudulent conduct of Mar-

tin, and notwithstanding the bill of lading had been signed before the corn was shipped; to which the plaintiffs excepted.

A verdict was taken for the defendants by consent; and if the whole court should be of opinion that they had a valid title to the corn, under the invoice and bill of lading, judgment was to be rendered upon the verdict; but if the court should be of opinion that the ruling was wrong, the verdict was to be set aside and the defendants defaulted, unless the court should also be of opinion that the depositions above mentioned were improperly admitted; in which case a new trial was to be granted.

SHAW, C. J.^s The first question arising in this cause is, whether the depositions of Jackson and others, under the circumstances, ought to have been admitted as competent. These were generally persons, of whom Martin had made similar purchases, of like articles, about the same time, and under circumstances tending to show that he was insolvent and had no reasonable expectation of paying for the merchandise according to his contract.

The objection to this evidence is placed on two grounds, first, that these persons having similar claims of their own, some of which are pending here, they have an interest in establishing the fraud which they are called to prove; and secondly, that the transactions being *res inter alios*, have no tendency to prove the fact in issue in this particular case.

But in our opinion, the objection cannot be sustained upon either ground. As to the first, it is quite clear, that the verdict and judgment in this case would not be evidence in either of theirs; that their interest is in the question and subject matter and not in the event of the suit, and therefore that the objection, such as it is, goes to the credit and not to the competency of the witnesses. As to the other objection, we think this evidence has a direct and material bearing upon the fact in issue. It tends to show, that at the time this ostensible purchase was made, Martin was insolvent, that he knew he was insolvent, that he had no reasonable ground to believe that he could pay the cash and did not expect or intend to pay the cash for the merchandise which he purchased, and so that he obtained the goods, by false pretenses. The fact of insolvency, of his knowledge of his insolvency, and that he had no expectation or intention of paying for the corn in question, is a material fact and the principal fact in controversy on which this case rests, and is material to the issue. The evidence bears upon the question *quo animo*, the intent, the fraudulent purpose.

2. It is next contended on the part of the plaintiffs, that no property passed by the fraudulent purchase of Martin, from the plaintiffs to him, so as to enable him to make a title to the defendants.

The evidence clearly shows that there was a contract of sale and

^s A portion of the opinion is omitted.

an actual delivery of the goods, by their being placed on board a vessel, pursuant to his order; and this delivery was unconditional, unless there was an implied condition arising from the usage of the trade that the delivery was to be considered revocable, unless the corn should be paid for, pursuant to the contract and to such usage. This contract and delivery were sufficient in law to vest the property in Martin, and make a good title, if not tainted by fraud. But being tainted by fraud, as between the immediate parties, the sale was voidable, and the vendors might avoid it and reclaim their property. But it depended upon them to avoid it or not, at their election. They might treat the sale as a nullity and reclaim their goods; or affirm it and claim the price. And cases may be imagined, where the vendor, notwithstanding such fraud, practised on him, might, in consequence of obtaining security, by attachment or otherwise, prefer to affirm the sale. The consequence therefore is, that such sale is voidable, but not absolutely void. The consent of the vendor is given to the transfer, but that consent being induced by false and fraudulent representations, it is contrary to justice and right, that the vendor should suffer by it, or that the fraudulent purchaser should avail himself of it; and upon this ground, and for the benefit of the vendor alone, the law allows him to avoid it.

The difference between the case of property thus obtained, and property obtained by felony, is obvious. In the latter case, no right either of property or possession is acquired and the felon can convey none.

We take the rule to be well settled, that where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor therefore can reclaim his property as against the vendee, or any other person claiming under him and standing upon his title, but not against a bona fide purchaser without notice of the fraud. The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale, and with a title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud. *Parker v. Patrick*, 5 Term R. 175. The same rule holds in regard to real estate. *Somes v. Brewer*, 2 Pick. 184, 13 Am. Dec. 406. * * *

Judgment on the verdict.

IV. Duress⁹

GALUSHA et ux. v. SHERMAN et al.

(Supreme Court of Wisconsin, 1900. 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.)

Action by D. H. Galusha and wife against Bradley B. Sherman and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Action in equity to set aside a note and mortgage on the ground of duress. The issues made by the pleadings sufficiently appear from the facts found by the trial court, which are in substance as follows:

October 29, 1894, Bradley B. Sherman, claiming to have been injured by eating impure meat, believing it to be wholesome, which was furnished to him for food by D. H. Galusha with knowledge, or reasonable means of knowledge, of its character, commenced an action against Galusha to recover compensation for such injury to the amount of \$5,000. A. J. Sutherland was Sherman's attorney. He employed J. H. Langdon to serve the summons and complaint, which service he performed and then advised Galusha to settle the claim, accompanying such advice by an assertion that if he did not do so he would be prosecuted criminally and sent to state's prison for from 3 to 14 years. Langdon induced Galusha to accompany him to Sutherland's office, where he was induced to mortgage his farm for \$1,000 to secure a note for that amount payable in three years, with interest thereon at the rate of 8 per cent. per annum, in settlement of the controversy. Sherman assigned the note and mortgage to Sutherland and the latter assigned the same to H. V. Scallon, both assignments being recorded November 5, 1894.

Galusha was a man of little education and experience, of a nervous temperament and easily frightened. The fact that a claim was made against him for more than he was worth, accompanied by threats of imprisonment for a long term of years if he did not settle it, deprived him of his freedom of will, and while he was in that condition the note and mortgage were procured. Such note and mortgage were given without consideration. The plaintiff Henrietta Galusha signed the note and mortgage in the absence of her husband, and in such a state of fear and excitement, caused by threats made to her, that it was not her voluntary act. The mortgaged property was worth \$3,000. Defendant Scallon is not the bona fide purchaser of the note and mortgage. On such facts judgment was awarded to plaintiffs, declaring the note and mortgage null and void and requiring them to be surrendered for cancellation, and for costs against defendants.

⁹ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 142-144.

There was evidence tending to prove that at Sutherland's office Galusha was locked in a room with Sutherland, and there again threatened with arrest and imprisonment for from 3 to 14 years if he did not settle, and that such threats were accompanied with such demonstrations on the part of Sutherland as to greatly distract Galusha and put him in fear of personal violence.

MARSHALL, J.¹⁰ * * * The trial court found that when the note and mortgage were executed, Galusha was not in the exercise of his free will, but was under the control of the will of Langdon and Sutherland, and that he was deprived of his own will power by the wrongful acts of the two persons named. That finding was, in the main, based on the circumstance that a complaint had been served upon Galusha, claiming damages to an amount sufficiently large, if established to its full extent, to absorb his entire property, and, upon disputed evidence that Langdon, who served the papers, urged him to visit Sutherland, the attorney for Sherman, and settle the controversy, stating that if he did not do so he would be arrested on a criminal warrant and sent to state's prison; that through Langdon's influence, and accompanied by him, respondent went to Sutherland's office; that he was there locked in a room with Sutherland, or with Sutherland and Langdon, and then threatened again with arrest and imprisonment for from 3 to 14 years unless he immediately settled the suit by paying \$1,000 or securing the payment of such sum; that such threats were accompanied by profanity on the part of Sutherland and by such demonstrations as to produce a belief in the mind of respondent that he was in danger of personal violence; that under such circumstances respondent submitted to Sutherland's demand and executed the papers in controversy, and also signed a communication to his wife directing her to sign, and gave such communication to Sutherland to enable him to secure her signature in the absence of her husband.

Appellants' attorneys contend that, assuming that the evidence on the part of respondent proves all that it tends to prove, the wrongful acts were not sufficient to constitute duress, hence not sufficient to warrant the finding that respondent was deprived of the free exercise of his will. In support of that, many suggestions are made and authorities cited which seem to call for a brief consideration of the law of duress as understood by this court. It is a branch of the law that, in the process of development from the rigorous and harsh rules of the ancient common law, has been so softened by the more humane principles of the civil law, and of equity, that the teachings of the older writers on the subject, standing alone, are not proper guides. The change from the ancient doctrine has been much greater in some jurisdictions than in others. There are many adjudications based on citations of authorities not in themselves harmonious, and many state-

¹⁰ A portion of the opinion is omitted.

ments in legal opinions based on the ancient theory of duress, which together create much confusion on the subject, not only as it is treated by text writers, but by judges in legal opinions.

Anciently, duress in law by putting in fear could exist only where there was such a threat of danger to the object of it as was deemed sufficient to deprive a constant or courageous man of his free will, and the circumstances requisite to that condition were distinctly fixed by law; that is to say, the resisting power which every person was bound to exercise for his own protection was measured, not by the standard of the individual affected, but by the standard of a man of courage; and those things which could overcome a person, assuming that he was a prudent and constant man, were not left to be determined as facts in the particular case, but were a part of the law itself. Co. Litt. 253. Said Sir William Blackstone (volume 1, p. 131): "Whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem, is prevailed upon to execute a deed or do any other legal act, these, though accompanied by all the other requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his noncompliance." "The constraint a man is under in these circumstances is called in law 'duress.'" "A fear of battery or being beaten, though never so well grounded, is no duress, neither is the fear of having one's house burned, or one's goods taken away and destroyed, because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages. But no suitable atonement can be made for the loss of life or limb."

Duress of imprisonment existed, by the old rule, only where there was actual, illegal restraint of liberty. The doctrine was: "If a man be imprisoned by order of law, the plaintiff may take a feoffment of him, or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding that imprisonment; for this is not by duress of imprisonment, because he was in prison by course of law, for it is not accounted in law duress of imprisonment, but where either the imprisonment, or the duress that is offered in prison, or at large, is tortious and unlawful." 2 Bac. Abr. p. 771. Thus it will be seen that, in the early days of the common law, duress, strictly so called, was matter of law. It was pleadable as a defense or as material to a cause of action, by alleging the existence of specific circumstances legally sufficient to constitute duress, and was established *prima facie* by proving the truth of such allegations. The effect of the facts so established was determinable as an inference of law, not of fact. Oppression of one person by another, causing such person to surrender something of value or some advantage to such other, not amounting to duress within the rigorous rules of law, regardless of whether the oppression actually deprived the oppressed party of the exercise

of his free will, was remediless except by an appeal to a court of equity, where a remedy was obtainable on the ground of unlawful compulsion. *Id.* 772.

It is interesting to follow the development of the law from the early period mentioned. To do so in this opinion would draw it out to a far greater length than is advisable; but we will proceed sufficiently to show the conflict in authorities on the subject, what has led to it, the correct doctrine at the present time, and the unsoundness of the contentions of appellants' counsel as to the law applicable to this case when tested by such doctrine. That seems to be necessary in order to show that the theories, advanced by appellants' counsel, to support the claim that the finding as regards respondent suffering from wrongful deprivation of his will power at the time he made the papers in controversy is not warranted by the evidence, are unsound. Those theories are: (1) Oppression does not constitute duress unless sufficient to overcome the will of a person of ordinary courage; (2) a threat to arrest a person for an offense of which he is not guilty does not constitute duress; (3) a threat to arrest a person on a charge that does not constitute a criminal offense does not constitute duress. All of such theories have some support in, but all are out of harmony with, the real foundation principle of duress, which is that it is the condition of the mind of the wronged person at the time of the act sought to be avoided, not the means by which such condition was produced. Such theories are also out of harmony with the theory upon which duress of a contracting party renders the contract voidable as to him, which is that the free meeting and blending of the minds of contracting parties are requisite to a binding contract.

Early in the development of the law, the legal standard of resistance that a person was bound to exercise for his own protection was changed from that of a constant or courageous man to that of a person of ordinary firmness. That will be found by reference to some of the earlier editions of Chitty on Contracts. See 1 Chit. Cont. (11th Ed.) p. 272; 2 Greenl. Ev. 301. But the ancient theory that duress was a matter of law to be determined *prima facie* by the existence or nonexistence of some circumstance deemed in law sufficient to deprive the alleged wronged person of freedom of will power, was adhered to generally, the standard of resisting power, however, being changed so that circumstances less dangerous to personal liberty or safety than actual deprivation of liberty or imminent danger of loss of life or limb, came to be considered sufficient in law to overcome such power. The oppressive acts, though, were still referred to as duress, instead of the actual effect of such acts upon the will power of the alleged wronged person. It is now stated, oftener than otherwise, in judicial opinions, that in determining whether there was or was not duress in a given case, the evidence must be considered, having regard to the assumption that the alleged oppressed person was a person of ordinary courage. The learned counsel for appellants have

referred to some such authorities to support their claim that the finding under discussion is contrary to law, in that the threats made to respondent, assuming his evidence to be true, were not sufficient to deprive a person of ordinary firmness of his free will power. From that it is argued that the finding is unwarranted.

That one should be led astray on the question of there being a legal standard of resisting power, by which the sufficiency of the oppressive conduct claimed to have produced duress in a given case must be tested, is most natural in view of the number and character of the authorities to that effect. As we have seen, the text of *Chitty* and of *Greenleaf* both so clearly indicate. In *U. S. v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457, a case generally cited as giving a very clear definition of duress according to the modern doctrine on the subject, Mr. Justice Clifford said: "Unlawful duress is a good defense to a contract if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness." On the same line, Mr. Justice Colerick, in *Hines v. Board*, 93 Ind. 266, said, citing from 4 Wait, Act. & Def. p. 490: "Mere threats of violence, or of prosecution, are not enough to constitute duress. There must be a reasonable ground for creating an apprehension that threats will be carried into execution, in the mind of a man of ordinary firmness and courage, and must operate upon him directly, so as to overcome his will."

Similar language is used in legal opinions of courts of many of the states, as will be shown by reference to the following: *Youngs v. Simm*, 41 Ill. App. 28; *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, and 29 N. E. 525; *Higgins v. Brown*, 78 Me. 473, 5 Atl. 269; *Wolfe v. Marshal*, 52 Mo. 167; *Burr v. Burton*, 18 Ark. 214; *Flanigan v. City of Minneapolis*, 36 Minn. 406, 31 N. W. 359; *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 321. In the last case cited the following instruction to the jury was approved: "The threats, if any were in fact made, must have been of such a character as to naturally overcome the mind and will of a person of ordinary firmness, and deprive him, for the time being, of the power of mind and will to resist the demand by the person making such threats." Those authorities indicate adherence to the doctrine of a legal standard of resistance by which to test the alleged wrongful acts; also adherence, generally, to the old doctrine of the legal sufficiency of particular threats or acts to produce duress, the only change in the former element, from the ancient common law, being the substitution of resisting power of a person of ordinary firmness for that of a prudent and constant man; and the only change in the latter element being the addition of elements of less severity than actual imprisonment or danger of loss of life or limb, as being sufficient to deprive a person, of the legal standard of resisting power, of his free will, leaving the only question of fact to be

determined by the jury, whether the will power of the oppressed person was in fact overcome in the particular case, the presumption, in the absence of evidence to the contrary, being in the affirmative.

It will be noted in an examination of the cases that the means used to overcome the person threatened are uniformly referred to as the duress, instead of the condition of mind produced thereby. In *U. S. v. Huckabee*, supra, it is said, "Decisions of high authority adopt the liberal rule that contracts procured by threats of battery to the person, or of distraint of property, may be avoided by proof of such facts." In *Harmon v. Harmon*, supra, it is said that mere threats of criminal prosecution do not constitute duress without threats of immediate imprisonment. Similar language is found in *Hillborn v. Bucknam*, 78 Me. 485, 7 Atl. 272, 57 Am. Rep. 816, and *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335. In *Knapp v. Hyde*, 60 Barb. (N. Y.) 80, it was held, following the old common-law doctrine, that in order to avoid an act on the ground of menace of arrest or imprisonment, it must appear that the menace was of unlawful imprisonment; while in *Insurance Co. v. Kirkpatrick*, 111 Ala. 456, 20 South. 651, it is said that the guilt or innocence of the alleged wronged party, or the lawfulness or unlawfulness of the threats, are immaterial, the material and only material question being, was the threat made for the purpose of overcoming the will of the person threatened, and did it have that effect, and was the contract thereby obtained?

Sufficient has been said to show the conflict that exists on the subject under discussion. The more advanced doctrine is that stated in the Alabama case cited. Under it, advantages obtained by what was considered duress by old common-law rules, or such rules as changed, in respect to the standard of resisting power which the threatened person is legally bound to exercise for his own protection or be remediless at law for the consequences, and in respect to the nature of the threats deemed legally sufficient to overcome a person of the legal standard of resisting power, and also advantages wrongfully obtained, though not by duress, in law, and remediable as such, but remediable in equity upon the ground of unjust compulsion, are now practically in one class. Duress, in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.

The making of a contract requires the free exercise of the will power of the contracting parties, and the free meeting and blending of their minds. In the absence of that, the essential of a contract is wanting; and if such absence be produced by the wrongful conduct of one party to the transaction, or conduct for which he is responsible,

whereby the other party, for the time being, through fear, is bereft of his free will power, for the purpose of obtaining the contract, and it is thereby obtained, such contract may be avoided on the ground of duress. There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained. The idea is that what constitutes duress is wholly a matter of law and is simply the deprivation by one person of the will power of another, by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly matter of fact, though of course the means may be so oppressive as to render the result an inference of law. It is a mistaken idea that what constitutes duress is different in case of an aged person or a wife or child than in case of a man of ordinary firmness. As said in *Wolff v. Bluhm*, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115, the condition of mind of a person produced by threats of some kind, rendering him incapable of exercising his free will, is what constitutes duress. The means used to produce that condition, the age, sex and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously, what will accomplish such result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, not any arbitrary standard, is to be considered in determining whether there was duress. The more modern text writers so state the law to be.

In *Bishop on Contracts* (719) it is said, in substance, that the proposition found in many of the cases that the threat must be such as would excite the reasonable apprehension of a person of ordinary courage, is certainly incorrect; that it originated in the failure of the old writers (referring to *Coke* on *Littleton*) to distinguish between the mind acted upon and the thing menaced; that the law of contracts considers the quality of the contracting mind, and therefore holds the apparent, not real, consent of the subject or timid person, or person of inferior intellect, as invalid as that of the strongest and most independent understanding, though the latter would not have been enthralled where the former was. In the last revisions of *Chitty on Contracts*, brought out in 1890 and 1896 (page 199 of the latter), the old text on the subject under discussion was changed to conform

to the doctrine as stated in Bishop on Contracts. A comparison of it with the early text is one of the best demonstrations that can be given of the great change that has taken place in the law under discussion from the early rules on the subject. The following is the new text: "It has been sometimes said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage to yield to it. I do not think this an accurate statement of the law. Whenever from natural weakness of intellect, or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in an uncertainty of the law on the subject, but in its application to the facts of each individual case."

In Chitty's work on Commercial Law, printed in 1824, it is said that "fear, which is sufficient to avoid a contract, must be a present fear, occasioned by some present or future danger, not a mere suspicion of the approach of danger, nor such an apprehension as would arise in the mind of a weak or timorous man, but such as would alarm a firm man, such as the fear of death or of bodily torment; that the fear of battery, which may be slight, will not amount to duress as will the fear of mayhem or loss of life." In support of the later text of Bishop and Chitty, Jr., see 10 Am. & Eng. Enc. Law (2d Ed.) 341; *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166; *Overstreet v. Dunlap*, 56 Ill. App. 486; *Parmentier v. Pater*, 13 Or. 121, 9 Pac. 59; *Earle v. Hosier Co.*, 36 N. J. Eq. 192; *Jordan v. Elliott*, 12 Wkly. Notes Cas. 56; *Williams v. Bayley*, 1 H. L. Cas. 200; *Scott v. Sebright*, 12 Prob. Div. 21.

From the foregoing it will be seen that the true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remediable by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value thereby taken from him.

The law as indicated, though not discussed at any great length in previous adjudications of this court, has always been the ruling principle of its decisions. In *Brown v. Peck*, 2 Wis. 261, it was said that if menaces are used, or equivalent acts of violence, such as to have an undue influence upon the party and to prevent the exercise of his own free will in executing the contract, it is voidable. True, the court was there speaking of the power of a court of equity to remedy a wrong, but the situation calling for such remedy was, as the court said, that there was no contract existing between the parties for want of assent by one party on account of the oppression to which he was subjected on behalf of the other.

In *Bank v. Kusworm*, 91 Wis. 166, 64 N. W. 843, and *Wolff v. Bluhm*, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115, the doctrine was stated in effect thus: Where one, by the wrongful act of another, is put in fear and thereby induced to make a contract or to forego some act under circumstances which deprive him of the exercise of his free will, duress exists; the wrongful act does not constitute the duress, but the condition of mind produced thereby. The act must be of such a nature and made under such circumstances as to constitute a reasonable, adequate cause to control the mind of the threatened person, and must have that effect; and the act sought to be avoided must have been performed by such person while in such condition. It will be noted that it was said, the cause producing incompetency to contract through fear, need only be reasonably sufficient to overcome the will power of the particular person acted upon. That it may be more or less than that required to overcome the mind of a person of ordinary firmness, according as the person acted upon is above or below the average in mental ability to protect himself against the influence of fear, is obvious.

There was unnecessarily added to a correct statement of the law, in *Wolff v. Bluhm*, a reference to the doctrine of the supreme court of Maine, as to the sufficiency of certain circumstances to constitute duress, not in harmony with the law as stated in this opinion. An arbitrary rule, that a threatened lawful arrest and imprisonment implying harsh or unreasonable use of criminal process, and where no warrant has been issued and there is no danger of the threat being immediately carried out, is not sufficient to produce duress, seems unreasonable. Such, however, is the doctrine of the supreme court of Maine, and the cases supporting it will be found very generally cited by text writers and judges. That rule goes naturally with the doctrine that every person, without regard to actual mental power, is bound to come up to the standard of average men in that regard or suffer the consequences.

We have now reached a point where it clearly appears that the contention of counsel for appellants, that the testimony of the plaintiff, undisputed, is legally insufficient to produce duress, cannot be sustained, and it remains to be seen whether the finding that duress was

in fact produced by the conduct of Sutherland and his confederate, Langdon, is contrary to the clear preponderance of the evidence.

Looking at the testimony of the several witnesses, as printed in the record, it is by no means certain but that the evidence preponderates to the side of the appellants, and that no clear case is made out such as is required to impeach a transaction for fraud. But when the circumstances disclosed are taken into consideration, the interest which the different witnesses had in the result, the opportunity that each had for knowing the facts in respect to which he testified, and everything appearing that aids in weighing the evidence and determining where the truth lies, doubt is produced as to the correctness of the findings which is reasonably resolved in their favor by giving due weight to those things which were available to the trial judge, and presumably were considered by him, that could not be made a part of the record.

This is peculiarly a case where opportunity to see the witnesses and observe their manner while testifying is of great importance in judicial search after truth. That the learned judge who made the findings studied the situation with the light that such opportunity cast upon it cannot be doubted, and the result is embodied in the findings which we are asked to reverse. There is a finding that respondent is a very nervous man and easily subject to be imposed upon in the manner in which it is claimed he was wronged. That circumstance was of importance in the case. There is very little evidence in the record in regard to it, but it is obvious that a personal study of the man during the trial, by one skilled in such matters, could hardly have failed to reveal the truth, without any direct evidence of the fact.

Considering respondent as a man of average firmness, intelligence and experience, it would be unreasonable to say that the preposterous assertions of Langdon and Sutherland, as to what they could and would do with him in the event of his not settling the Sherman claim, emphasized even by loud and vehement expressions, by profanity and gesticulations, would have affected him otherwise than by producing anger, amusement or disgust; but a view of respondent and study of him in court may easily have satisfied the trial court that he was a man liable, under the circumstances in which he was placed, to be deluded, and to regard falsehood as truth and mere shamming as serious reality.

The record shows that a hard-working, middle-aged farmer, not of sufficient intelligence to know his legal rights, was, without previous negotiations for a settlement of an existing doubtful claim, sued upon it for a sum perhaps in excess of his entire fortune, the papers being served by a shrewd person specially employed for that purpose, instead of by an officer; that on the same day such person accompanied the defendant to the presence of the plaintiff's lawyer, and that an agreement was there obtained from such defendant to pay, in settlement of the controversy, an amount representing a large portion of his entire property,—probably the accumulation of many years of labor,—and to

secure such agreement by a mortgage upon his home. The transaction, of itself, is unnatural and unexplainable upon any reasonable theory other than that respondent was a weak man, easily influenced, and that considerable pressure was put upon him to produce the result accomplished. The probabilities point that way in the absence of evidence explaining how the thing was brought about.

The explanation on the part of appellants is that respondent went to Sutherland's office of his own free will and out of a desire for an immediate settlement of the claim on the best terms possible, and that he desired the presence and assistance of Langdon. That explanation does not strike one as reasonable. Why should respondent desire, expect or rely on help from the agent of the attorney for the adverse party in making a settlement? Why did he not go to some neighbor, acquaintance or friend or some lawyer for counsel instead of relying on Langdon? Those questions are not answerable from the record except by respondent's own evidence that he was induced, by Langdon's threats, to believe that it was best for him to visit Sutherland and settle immediately in order to avoid arrest and imprisonment. Why did he finally settle with the attorney for the adverse party and agree to surrender, in satisfaction of the claim made upon him, such a large proportion of his property, without taking time for reflection or making an effort to obtain counsel, when he could not have been prejudiced by waiting at least till near the expiration of the 20 days allowed in which to answer the complaint, before making a settlement?

Nothing in the record furnishes an answer to that, except the evidence of respondent that he was threatened with arrest and imprisonment if he did not submit to the demand for a speedy settlement. The very fact that respondent went to the office of Sutherland and settled a claim of such a serious nature in the manner in which the settlement was made, without an effort to take counsel in respect to it, is a very strong circumstance tending to show that he was of that mental make-up liable to be controlled and moved to action, to his disadvantage, by fear.

Looking to the direct evidence of what occurred, that of respondent and Langdon in regard to the threats made when the papers were served is in direct conflict. The probabilities, however, are in favor of the latter. That of Langdon and Sutherland as to what occurred at Sutherland's office is in direct conflict with that of respondent; but the probabilities are rather in favor of the truth of the material part of the respondent's story, to the effect that he was actually threatened with arrest and imprisonment unless he made the settlement demanded, and was told and made to believe that the offense alleged against him was one that might subject him to arrest and punishment by a long term of confinement in state's prison.

We have not overlooked any of the evidence bearing on the question under consideration. It has all been read with care. Respondent may be mistaken as to having been locked in a room with Sutherland, but

there is no dispute but that he was taken into Sutherland's private room where what was said between the two could not readily be heard by persons in the general office if the door between the two rooms was closed; and there is evidence independent of respondent's testimony, showing that such was its condition at least part of the time. It may be that Sutherland did not use profane language in threatening respondent, and that when the former went into the main office after the settlement agreed upon the persons there did not observe in him any appearance of excitement, yet it may be true that he threatened the respondent with arrest and imprisonment, and produced in his mind a conviction that such would be the result of a refusal to speedily settle the claim, and that he was thereby rendered incapable of exercising his judgment in respect to complying, or refusing to comply, with the demand made upon him; and that in taking the latter course he merely carried out Sutherland's will instead of his own.

As we view the record, the issue as to whether the threats were made as claimed turns on the evidence of respondent on the one side, and Sutherland and Langdon, considered practically as one person, on the other, and the circumstances characterizing the whole transaction. The unnaturalness of the occurrence of giving the note and mortgage, under all the circumstances, except as explained by mental weakness on the part of respondent and fear of punishment as a criminal if he did not settle the claim made upon him, is such that in view of the corroborating evidence we cannot say but that the trial court's determination, that respondent's story is in the main true, is correct. There is evidence to the effect that the attorney declared, to persons who partook of the alleged impure meat with Sherman, that he had scared respondent into a settlement of the Sherman claim for the purpose of inducing them to make a like claim. That evidence is disputed, it is true, but it cannot be ignored. There is also the circumstance of the attorney and his alleged confederate arming themselves with a written direction from respondent for his wife to sign the papers, and their going to his farm immediately after he executed such papers to obtain her signature thereto in the absence of her husband.

It undoubtedly appeared to the trial court that if respondent had been anxious to make the settlement, as appellants claim, and acted of his own free will, he would have taken the attorney to his home to obtain her signature to the papers in his presence, or would have procured her presence at the attorney's office; and that no unusual or hasty method would have been resorted to for the purpose of obtaining such signature. There are many other circumstances to which special reference has not been made, that throw some light on the transaction under consideration, but further discussion of the evidence is unnecessary.

We are unable to say that the trial court was not justified in saying that the charge of duress was established by clear and satisfactory evidence. True, in a case of this kind the facts essential to the cause

of action must be established by a greater degree of certainty than in a case where fraud is not the foundation of the cause of action; but when a trial court says that the requisite certainty is established by the evidence, that decision must prevail on appeal unless clearly wrong.

The finding of fact to the effect that appellant Scallon and his assignee are each chargeable with notice of the manner in which the note and mortgage were obtained from respondent, cannot be disturbed. It is not deemed necessary or advisable to discuss the evidence in regard to it. There are many circumstances shown tending to prove that the transfer of the securities was made, first to Sutherland and then to Scallon in order to avoid the very attack made upon them by the bringing of this action. Moreover, as respondent's counsel contends, since the note was payable to Sherman's order and was not indorsed by him to Sutherland or by Sutherland to Scallon, the latter cannot claim the protection of the law merchant. He stands in precisely the same position as Sherman did, the note being subject to all the equities of the respondent the same as if no transfer of it had taken place. *Terry v. Allis*, 16 Wis. 478; *Howard v. Boorman*, 17 Wis. 459; *Daniel*, Neg. Inst. § 741, and cases cited.

The judgment of the circuit court is affirmed.

V. Undue Influence ¹¹

McPARLAND et al. v. LARKIN.

(Supreme Court of Illinois, 1895. 155 Ill. 84, 39 N. E. 609.)

Bill by Margaret Larkin against James McParland and others to set aside a deed. Complainant obtained a decree. Defendants appeal.

PER CURIAM.¹² In March, 1880, James Fitzgerald died, seised in fee of lots 72, 73, 74, and 75, of subplot or block 42, in Canal Trustees' subdivision of section 33, township 40 N., range 14 E. of the third P. M. in Cook county, Ill., which lots, with the cottage thereon, constituted the family homestead, and left, surviving him, as his children and heirs at law, Edward Fitzgerald, Mary Ann McParland, and Margaret Fitzgerald, the latter then a minor of 16 years, who, after attaining majority, married one Larkin, and is the complainant (appellee) in this case. The decedent also left, as his widow, Bridget Fitzgerald, stepmother of said children. And, in addition to said realty, he also left \$2,000, life insurance, payable to his children. James McParland, husband of the daughter Mary Ann, was duly appointed

¹¹ For discussion of principles, see *Clark on Contracts* (2d Ed.) §§ 145, 146.

¹² A portion of the opinion is omitted.

administrator of the estate and guardian of the person and property of said minor child. In consideration of \$1,100, the widow relinquished her award, dower, and homestead rights, the money for this purpose being advanced, it seems, by the children Edward and Mary Ann out of their share of the insurance money, who were to be reimbursed for the proportion thereof falling upon Margaret, out of the latter's one-third interest in the estate. The estate being somewhat involved in debt, means were devised for paying the indebtedness without sale of the realty. Edward and Mary Ann each advanced a third, the other third being advanced out of said minor's estate, by order of the probate court. In 1880, Edward sold and conveyed his one-third interest in the realty to his sister Mary Ann for the sum of \$980. The minor, Margaret, until her marriage to Larkin, in June, 1882, made her home with her sister, Mrs. McParland, and her husband who occupied the premises. They, it would seem, stood in loco parentis to the minor. They cared for her as though she was their child, sending her to school, etc.; no charges for board, clothing, and other necessities, at the times they were furnished, being made.

On February 24, 1882, six days after attaining her majority, Margaret executed a deed purporting to convey to her sister, Mary Ann McParland, her one-third interest in said real estate, at which time she was paid a small sum of money. This deed, as alleged in the bill, was procured by deception and undue influence exerted by her guardian, James McParland, over her, and without knowledge on her part of her rights in the premises, or of what was due her out of the estate of her father; and that said deed was executed solely relying upon her guardian, in whom she had great confidence; and that, in fact, she was not aware of having conveyed away her interest until a short time before the filing of her bill. The sister, Mrs. McParland, testified that she tried to take her mother's place towards complainant, and that the latter looked up to her as such, and the evidence tends strongly to show that complainant looked to her guardian as taking the place of her father. The guardian did not make his final report until the 25th of May, following the making of said deed; so that, in effect, the guardianship continued until long after the making thereof. *Gilbert v. Gupstill*, 34 Ill. 112; *Schouler*, Dom. Rel. § 382.

It is, however, contended that the deed was made with full knowledge of all the facts, six days after complainant had arrived at her majority, without undue influence, and for a good and sufficient consideration, and its validity is not therefore to be questioned. It will be readily admitted that, if the parties were dealing at arm's length, fraud must be shown to justify setting aside the deed. *Baird v. Jackson*, 98 Ill. 78; *Warrick v. Hull*, 102 Ill. 280. And it may be generally said that where the guardianship had terminated, and the influence of the guardian upon the ward has ceased, so that they can be said to stand upon an equality, transactions between them will be regarded as bind-

ing. Schouler, Dom. Rel. § 389. "But such transactions are always to be regarded with suspicion. And where the influence still continues, as if the ward be a female or a person of weak understanding, and the guardian continues to control the property or to furnish a home, the court is strongly disposed to set aside the bargain altogether." But these observations have but little, if any, bearing here, as in this case the relation of the guardian and ward had not been legally dissolved. In such case, as said by Mr. Pomeroy (2 Eq. Jur. 961), "the relation is so intimate, the dependence so complete, the influence so great, that any transactions between the two parties, or by the guardian alone, through which the guardian obtains a benefit, entered into while the relation exists, are in the highest degree suspicious. The presumption against them is so strong that it is hardly possible for them to be sustained."

So, in *Gillett v. Wiley*, 126 Ill. 325, 19 N. E. 287, 9 Am. St. Rep. 587, where the guardian procured his ward, after the latter (a young man) had attained his majority, to sign a receipt in full for all money which came into his hands as guardian, the ward not reading the paper or acquainting himself with its contents, but relying solely on the statement of his guardian as to its character and purport, it was held that the transaction was void, even as against a surety upon such guardian's bond, who had taken a mortgage on the latter's land as indemnity against loss as surety. And it was there said: "Ordinarily, one having the means of information as to the contents of a paper executed by him will * * * be held to have known the contents, and will not be permitted to assert his ignorance of its contents to avoid responsibility according to its real import. Here, however, the signing of this receipt was the act and will of the guardian, rather than that of appellee. Courts will watch settlements of guardians with their wards, or any act or transaction between them affecting the estate of the ward, with great jealousy. From the confidential relation between the parties it will be presumed that the ward was acting under the influence of the guardian, and all transactions between them prejudicially affecting the interests of the ward will be held to be constructively fraudulent. *Carter v. Tice*, 120 Ill. 277, 11 N. E. 529. The doctrine is thus stated in 1 Story, Eq. Jur. § 317: Where the guardianship has, in fact, ceased by the majority of the ward, the courts 'will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate, in the highest sense of the term, the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian; for, in all such cases, the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attaching to the situation have not ceased; as if the accounts between the parties have

not been fully settled, or if the estate still remains, in some sort, under the control of the guardian.' ”

Here the ward was a female, barely past the age of 18 years, practically without knowledge or experience in business affairs. The peculiar interests of the guardian were opposed to her own. His wife then owned the other two-thirds of the realty in question, and by this deed was acquiring the third belonging to the ward. The ward was induced to execute a deed, prepared by the guardian for her signature, for an inadequate consideration, greatly less than the real value of her interest, unless there be taken into consideration her prior support and maintenance in her sister's family. True, the presumption of undue influence of the guardian is attempted to be overthrown by proof. But as said in the case just quoted from: “The presumption of influence on the part of the guardian, and the dependence of the ward, continues after the legal condition of guardianship has ended; and transactions between them during the continuance of the presumed influence of the guardian will be set aside, unless shown to have been the deliberate act of the ward, after full knowledge of her rights. In all such cases the burden rests heavily upon the guardian to prove the circumstances of knowledge, and free consent on the part of the ward, good faith, and absence of influence, which alone can overcome the presumption.”

It is not necessary in such cases that actual and intentional fraud be established. It is sufficient, when the parties sustained the relation of guardian and ward, that the former has gained some advantage by the transaction with his ward, to throw the burden of proving good faith and absence of influence, and of knowledge and free consent of the ward, upon the guardian. This we are not prepared, after the most careful consideration of the evidence, to say has been done, and the decree of the chancellor setting aside the deed must be affirmed. Nor can it make the slightest difference that the conveyance was made to the wife of the guardian, under whom he subsequently acquired title. As already seen, both the husband and wife stood in the relation of parents to complainant, while the husband was guardian. The relations precluded their deriving advantage from the ward, and it was his duty to protect her estate from spoliation from whatever source.

It is next insisted that in respect of the \$860, which constituted the consideration for the deed, the court should, by its decree, have required return by the ward of the amount, or a sale of the ward's interest in the premises to pay it, as a condition upon which the deed should be canceled. This contention is without merit. It is true that in case of sale and conveyance of land by the ward to the guardian, where the ward afterwards elects to repudiate the transaction, and seeks in equity to have the deed set aside, he must do equity, and pay back to the guardian the amount received, or else suffer a decree charging his land with sale to satisfy the same. *Wickiser v. Cook*, 85

Ill. 68. But such is not the case here. By the findings of the master, approved by the court, large sums of money were found due the ward from the guardian, and in the settlement of which the court, by its decree, credited the guardian with the above amount, which was equivalent to a payment in money. It would be useless for the court to make the consideration paid a charge on the ward's land when, by an adjustment of the amounts due between them, it could, and in fact should, be deducted. There was no occasion for such an order when the guardian could be paid by simply deducting it from the amount owing to the ward.

It is further insisted that appellee should take her interest in the property as it was at the date of the deed; that all improvement made thereon belonged to the appellants, subject to the right of appellee to obtain title thereto by contribution of her share of the cost or present value thereof; and the doctrine in respect of tenants in common—that, where one tenant makes improvements on the premises held by them in common, the court, in making partition, should require due compensation therefor, from the other tenants to be made—is invoked in support of this view. The court found that Mary Ann McParland, grantee in the deed, “was not an innocent purchaser of said real estate, but was charged with and had full knowledge of the fiduciary relation existing, at the time of said contract and sale of said real estate, between the complainant and the guardian, her husband.”

This finding is unquestionably sustained by the proof. The grantee was bound to know that her husband, the guardian, had no authority, except by order of the probate court, to do otherwise than protect, care for, and preserve the estate for the benefit of his ward, until the latter attained majority or he was legally discharged from his office. She was bound to know the fallibility of her title, and that, under the circumstances, it was defeasible on attainment of the ward's majority, at the latter's election, and to know, as above shown, that the transactions between the guardian and ward culminating in the making of said deed by the latter to her were liable to be declared fraudulent and void. She was bound to know that it was the guardian's duty to keep the premises in good repair, and render them available as a means of revenue for the benefit of the ward, and to this end, with the sanction of the court, to use the ward's cash in his hands for that purpose within reasonable limits. These principles are familiar. But she was also bound to know that he could not, by virtue of guardianship, and without any order from any competent tribunal, erect buildings upon the land or make expensive permanent improvements thereon. And it has been held that where the guardian makes advancement of money for such purpose, without any order of court, he is remediless. *Schouler*, Dom. Rel. § 351; *Hassard v. Rowe*, 11 Barb. (N. Y.) 22; *Bellinger v. Shafer*, 2 Sandf. Ch. (N. Y.) 293.

Such, however, has not been as yet the holding of this court in such

case. But by section 24, c. 64, Rev. St., it is provided: "The guardian may, by leave of the county court, mortgage the real estate of the ward for a term of years not exceeding the minority of the ward, or in fee; but the time of the maturity of the indebtedness secured by such mortgage shall not be extended beyond the time of minority of the ward." In passing upon this section (then section 134 of the statute of wills), this court, in *Merritt v. Simpson*, 41 Ill. 391, where the guardian had mortgaged land of his ward in fee, beyond the period of minority, for money which was used in erecting a brick store on the premises, which brought a large rental, held that such mortgage was nugatory and void as far as the interests of the ward were involved. And it seems to be generally held that the guardian cannot ordinarily execute a mortgage which will be operative as a lien on the ward's land beyond the term of minority, and the ward, on reaching majority, elects to disaffirm it, and that the only safe course for the guardian to pursue is to first secure the order of court authorizing the mortgage, if there be some statutory provision permitting it. 1 Jones, *Mortg.* 102b; Schouler, *Dom. Rel.* § 352; and cases in notes.

It would therefore necessarily follow that Mary Ann McParland, not being an innocent purchaser, but having taken her deed with full knowledge of the guardianship and infirmity of her title, was bound to know that the mortgaging of said property for the purpose of making improvements thereon was, as to the interest of the ward, wholly unauthorized, and done at her peril. She is entitled to no more protection in equity than the guardian himself would be had he taken the deed in his own name instead of his wife's. The legal and logical effects are the same. With such knowledge, she cannot be permitted to take advantage of that which, in legal contemplation, is her own wrong, to burden the estate of the ward. And no good reason exists why the ward might not, after attaining majority, demand, as in case where the guardian himself has placed unauthorized burdens and improvements upon the estate, to be placed in statu quo. Schouler, *Dom. Rel.* § 348. But the court may, in the exercise of its equity powers, protect indebtedness incurred for improvements upon the ward's estate, upon the theory that the estate has been benefited and the ward received an advantage thereby. *Id.* § 351; *Hood v. Bridport*, 11 Eng. Law & Eq. 271; *Jackson v. Jackson*, 1 Grat. (Va.) 143; 1 Atk. 489. And this the court did by finding the appellee to be entitled to a one-third interest in the premises, subject to the lien of the trust deeds thereon, which had been given to make said improvements, after the execution of the deed.

As to the improvements made upon the old house during appellee's minority, and without any authority from the probate court, appellee electing to repudiate all liability therefor, the court held rightfully, we think, that the interest of the ward should not be incumbered or chargeable therewith, but that appellant and his wife, having placed

such improvements in violation of the trust, were not, in equity, entitled to recompense for the same. The court, however, decreed that appellants should be allowed to remove the old cottage, which had been remodeled and improved, from the premises within four months, and, in default thereof, that the same should become part thereof. Of this ruling we think appellants have no right to complain. These improvements were placed upon said premises, and the interest of appellee wrongfully burdened to pay for the same. Appellants took the risk, and made such improvements with knowledge that they were doing so wrongfully, and without the shadow of authority from any competent source. * * *

The decree of the circuit court will be affirmed. Affirmed.

LEGALITY OF OBJECT

I. Agreements in Violation of Positive Law¹

1. BREACH OF RULES OF COMMON LAW

ATKINS v. JOHNSON.

(Supreme Court of Vermont, 1870. 43 Vt. 78, 5 Am. Rep. 260.)

Assumpsit as per declaration, which is set out in the opinion of the court. Trial on general demurrer to the declaration, at the March term, 1870, Peck, J., presiding. The court, pro forma, adjudged the declaration insufficient, and rendered judgment for the defendant to recover his costs. Exceptions by the plaintiff.

PIERPOINT, C. J. The case comes into this court upon a general demurrer to the plaintiff's declaration.

The declaration alleges that "on the 22d day of July, 1867, the defendant, by his agreement in writing of that date, undertook and promised the plaintiff that, in consideration that the plaintiff would print and publish an article in the *Argus and Patriot*, a weekly newspaper published in Montpelier by the plaintiff, entitled 'A Jack at all Trades Exposed,' that said article was all true, that there was enough to back it up, &c., and that he, the said defendant, would defend and save harmless the plaintiff from all damage and harm that might accrue to the plaintiff in consequence of publishing said article. That said article, if untrue, was a libel upon the character of one John Gregory; that relying upon the said promises of the defendant he published the article; that after said publication the said Gregory called upon the plaintiff for the name of the writer of the article; that thereupon the defendant requested the plaintiff not to give the said Gregory the name of the writer, and, in consideration thereof, promised the plaintiff that he would save him from all harm; that if said Gregory sued the plaintiff, that he, the defendant, would defend the suit, prove the charges, and save the plaintiff from all trouble and expense in the premises. The plaintiff, relying thereon, withheld the name of the defendant as the author of said article; that the said Gregory sued the plaintiff; that the defendant failed to defend the said suit, and the said Gregory recovered a judgment against the plaintiff, which he has been compelled to pay, and the defendant refuses to indemnify him."

The plaintiff is here seeking to compel the defendant to indemnify

¹ For discussion of principles, see *Clark on Contracts* (2d Ed.) §§ 150, 151, 153.

him for the damage which he has sustained, in consequence of publishing a libel, at the request of the defendant, and from the consequences of which the defendant agreed to save him harmless.

The question is, whether such an agreement as the plaintiff sets out in his declaration can be legally enforced.

The general principle, that there can be no contribution or indemnity, as between joint wrong-doers, is too well settled to require either argument or authority.

To this rule there are many exceptions, and prominent among them is the class of cases where questions arise between different parties as to the ownership of property, and a third person, supposing one party to be in the right, upon the request and under the authority of such party, does acts that are legal in themselves, but which prove in the end to be in violation of the rights of the other party, and he, in consequence thereof, is made liable in damages. If in such case there was a promise of indemnity, the law will enforce it, and if there was not, if the circumstances will warrant it, the law will imply a promise of indemnity, and enforce that. Of this class are most of the cases cited and relied upon by the counsel for the plaintiff, such as, *Betts v. Gibbins* [29 Eng. Com. Law, 47]; *Adamson v. Jarvis* [13 Eng. Com. Law, 403]; *Wooley v. Batte* [12 Eng. Com. Law, 649]; *Avery v. Halsey* [14 Pick. (Mass.) 174], &c. But we apprehend that no exception has ever been recognized broad enough to embrace a case like the present; indeed such an exception would be a virtual abrogation of the rule.

In this case, these parties in the outset conspired to do a wrong to one of their neighbors, by publishing a libel upon his character. The publication of a libel is an illegal act upon its face. This, both parties are presumed to have known. The publication not only subjects the party publishing to a prosecution by the person injured for damages, but also to a public prosecution by indictment. In either case, all that would be required of the prosecutor would be to prove the publication by the party charged. The law in such case presumes malice and damage, and the prosecutor would be entitled to a judgment, unless the party charged could introduce something by way of defense that would have the effect to discharge him from legal liability; failing in that, the party would be made liable upon a simple state of facts, all of which he perfectly understood at the time he commenced his unjustifiable attack.

In this case, both these parties knew that they were arranging for and consummating an illegal act, one that subjects them to legal liability, hoping, to be sure, that they might defend it; but the plaintiff, fearing they might not be able to do so, sought to protect himself from the consequences, by taking a contract of indemnity from the defendant. To say under such circumstances that these parties were not joint wrong-doers, within the full spirit and meaning of the general rule, would be an entire perversion of the plainest and simplest proposition. This being so, the law will not interfere in aid of either. It will not

inquire which of the two are most in the wrong, with a view of adjusting the equities between them, but regarding both as having been understandingly engaged in a violation of the law, it will leave them as it finds them, to adjust their differences between themselves, as they best may.

But it is said in argument, that to apply this rule in a case like the present is an encroachment upon the "freedom of the press." We do not so regard it. The freedom of the press does not consist in lawlessness, or in freedom from wholesome legal restraint. The publisher of a newspaper has no more right to publish a libel upon an individual, than he or any other man has to make a slanderous proclamation by word of mouth.

It is also said that the publisher of a newspaper, in his desire to furnish the public with information of what is transpiring in the community, is liable to be misled and deceived in regard to what he publishes. This is undoubtedly true, and it is equally true that he often is deceived; but in such case he ordinarily has ample means of relieving himself, either by correcting the error, or giving up the name of the author of the objectionable communication. Had the plaintiff in this case given the name of the author of the article to Gregory when he asked for it, he would undoubtedly have cast the responsibility upon the shoulders of him who ought to bear it. By refusing to do this, he put himself in the gap, and voluntarily assumed the whole responsibility, relying on the defendant's guaranty to indemnify him.

But it is further insisted, that what is alleged to have transpired between the plaintiff and defendant after Gregory had called on the plaintiff for the name of the author, constituted a new and independent contract, based upon a new and legal consideration. This proposition we think is not tenable. What passed between the parties on that occasion is a mere reiteration of the original agreement, and based substantially upon the same consideration. It was evidently so regarded by the pleader when he drew the declaration. It is all incorporated in the same count, being a simple narration of the events as they transpired. The promise on that occasion was to save the plaintiff from all harm, trouble and expense in the premises, in case the said Gregory should sue him.

This question was fully considered in the case of *Shackell v. Rosier*, 29 Eng. Com. L. 695. In that case the plaintiff, Shackell, was the publisher of a newspaper. The defendant applied to him to publish an article that was libelous on its face, but which the defendant assured him was true. After the publication, the party aggrieved brought his action against the plaintiff for the libel. The defendant thereupon promised the plaintiff, that if he would defend said suit, he, the defendant, would save harmless and indemnify the plaintiff from all payments, costs, charges and expenses, &c. On trial, there was a verdict for the plaintiff. This was arrested and set aside. Park, J., says it is impossible to look at this declaration, without seeing that the publica-

tion of the libelous matter formed part of the consideration for the defendant's promise. "It would be productive of great evil, if the courts were to encourage such an engagement as this, and thereby hold out inducement to the propagation of illegal and unfounded charges;" and then quotes from Lord Lyndhurst as follows: "I know of no case in which a person, who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the offense." Vaughan, J., says: "In this case the court itself would become accessory to the publication of libels, if it was to enforce such a contract as the present." Bosanquet, J., says: "I am of opinion that the promise and consideration both appear on the record to be illegal. The promise is to save harmless and indemnify the plaintiff, &c. It appears that the publication was made at the solicitation of the defendant, a publication manifestly illegal, and open to indictment; at once the subject of an action at the suit of the party offended, and an offense against the public. The case does not therefore fall within the principle laid down by Lord Kenyon, in *Merryweather v. Nixan* [8 T. R. 186], as the act done by the plaintiff here was unlawful within his own knowledge." The principles recognized and promulgated in this decision cover substantially the whole case now before us.

The position, in which the facts confessed upon the record place the defendant, is not an enviable one. He seems to have originated the mischief—to have induced the plaintiff to aid him in carrying it into effect, by assurance of the truth of the statements, and a promise of indemnity, and after standing by and seeing the plaintiff amerced in damages, takes advantage of a strictly legal defense, and throws the whole responsibility upon the plaintiff. Personally, it would have given me satisfaction to have decided the case for the plaintiff, if it could have been done without violating well-established and salutary rules of law.

Judgment of the county court is affirmed.

2. AGREEMENTS IN BREACH OF STATUTE

(A) In General—Prohibition by Statute

VANMETER et al. v. SPURRIER et al.

(Court of Appeals of Kentucky, 1893. 94 Ky. 22, 21 S. W. 337.)

Action by Spurrier & Bading against H. B. Vanmeter and others on a note given by defendants to the Thompson & Edwards Fertilizer Company in payment of fertilizers. From a judgment in plaintiffs' favor, defendants appeal.

LEWIS, J.² Appellees, Spurrier & Bading, assignees, brought this action on a note given October, 1888, to the Thompson & Edwards Fertilizer Company by appellants, Vanmeter and others, the consideration being commercial fertilizer sold and delivered in sacks to the purchasers. Two distinct grounds of defense are stated in the answer, which is also made a counterclaim: (1) That plaintiffs represented the commodity to be valuable and good for wheat, but that it turned out to be, after being properly applied, and was, in fact, worthless as a commercial fertilizer, and consequently the note is without consideration; (2) that by reason of noncompliance of the sellers with provisions of "An act to regulate the sale of fertilizers in this commonwealth, and to protect agriculturists in the purchase and use of the same" approved April 13, 1886, the note is void and unenforceable.

As an issue of fact in respect to the first alleged ground of defense was made by the pleadings, and submitted to and determined by the jury in favor of the plaintiffs, we will not here consider it.

The statute mentioned is substantially as follows:

"Section 1. On or before the first day of May of each year, before any person or company shall sell, offer, or expose for sale in this state any commercial fertilizer whose retail price is more than ten dollars per ton, said person or company shall furnish to the director of the agricultural experiment station, inaugurated by the Agricultural & Mechanical College of Kentucky, (which station is here recognized as the 'Kentucky Agricultural Station,') a quantity of such commercial fertilizer, not less than one pound, sufficient for analysis, accompanied by an affidavit that the substance so furnished is a fair and true sample of a commercial fertilizer which said person or company desires to sell within this state.

"Sec. 2. It shall be the duty of said director to make or cause to be made a chemical analysis of every sample of commercial fertilizer so furnished him, and he shall print the result of such analysis in the form of a label. Such label shall set forth the name of the manufacturer, the place of manufacture, the brand of the fertilizer, and the essential ingredients contained in said fertilizer, expressed in terms and manner approved by said director, together with a certificate from the director, setting forth that said analysis is a true and complete analysis of the sample furnished him of such brand of fertilizer; and he shall also place upon each label the money value of such fertilizer, computed from its composition, as he may determine. The director shall furnish such label in quantities of five hundred, or multiples thereof, to any person or company desiring to sell, or expose for sale, any commercial fertilizer in this state.

"Sec. 3. Every package of any commercial fertilizer whose retail price is over ten dollars per ton, sold or offered for sale in this state,

² A portion of the opinion is omitted.

shall have attached to it, in a conspicuous place, a label bearing a certified analysis of a sample of such fertilizer from said director, as provided in the foregoing sections.

"Sec. 4. Any manufacturer or vendor of any commercial fertilizer who shall sell, offer, or expose for sale any fertilizer without having previously complied with the provisions of this act, hereinbefore set forth, shall, upon indictment and conviction, be fined one hundred dollars for each violation or evasion of this act, which fines shall be paid into the state treasury.

"Sec. 5. The director shall receive for analyzing and affixing his certificate the sum of fifteen dollars; for labels furnished, one dollar per hundred."

Section 6 requires the director to pay all such fees into the treasury of the Agricultural & Mechanical College of Kentucky, to be used "in meeting the legitimate expenses of the station, in making analysis of fertilizers, in experimental tests of the same, and in such other experimental work and purchases as shall inure to the benefit of the farmers of this commonwealth." The director is required to report to the commissioner of agriculture the work done by him, an itemized statement of receipts and expenditures; and among other provisions of section 7 is one authorizing any agriculturist, purchaser of a commercial fertilizer, to forward a sample of same to the experimental station for analysis, free of charge.

Counsel for appellees contends, for various reasons we will now consider, that the statute is unconstitutional. * * *

In our opinion the law is valid in every respect. It is admitted that the retail price of the fertilizer sold to appellants was worth over \$10 per ton, and that no one of the packages had attached to it when sold the label required by section 3 of the statute; and the main question, therefore, is whether the contract sued on is, by reason of such non-compliance with, and disregard of, the statute, void and unenforceable. It is too well settled for argument that a contract prohibited by statute will not, nor should be, enforced by the court; but whether a contract has been prohibited sometimes depends upon construction of such statute when not clear in meaning, and we will at present assume such is this case.

In Benjamin on Sales (volume 2, p. 712) the following two propositions are stated to be fairly deducible from the authorities: "First. That, when the question is whether a contract has been prohibited by statute, it is material in construing the statute to ascertain whether the legislature had in view solely the security and collection of the revenue, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts; in the latter, that it was. Second. That, in seeking for the meaning of the lawgiver, it is material, also,

to inquire whether the penalty is imposed once for all on the offense of failing to comply with the requirements of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case the statute is intended to prevent the dealings, to prohibit the contract, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced."

Tested by either one of these rules, the statute in question would have to be construed as intended to prohibit the contract in case of noncompliance with or breach of its provisions; for the legislature had in view, when enacting it, not the security and collection of the revenue, even partly, but had in view the protection of the public from fraud in contracts for sale of fertilizers; and it is expressly provided in section 4 that the fine shall be imposed for each violation or evasion of the act. In *Lindsey v. Rutherford*, 17 B. Mon. 248, the following proposition, stated in *Chitty on Contracts*, was referred to with approval: "A contract is void if prohibited by statute, though the statute only inflicts a penalty, because such penalty implies a prohibition. If the contract be illegal, it makes no difference, in point of law, whether the statute which makes it so had in view the protection of the revenue or any other object." But it was nevertheless there held that contracts for sale and purchase of bills of exchange were not prohibited by the statute then under consideration, which required each person conducting the business of brokers or exchange dealers to obtain a license, under penalty of a fine; the court being of opinion that the statute was intended to raise revenue, not to strike a blow at the business.

But neither the conclusion in that case nor reason for it affects the question before us; for there is a marked difference between a statute the prime or sole purpose of which is to secure or raise revenue by a license tax, and one enacted to protect the public against fraudulent sale of goods, or for other reason of public policy. To prohibit a contract in one case, where the business is known and recognized to be otherwise lawful and legitimate, is not essential to the main purpose, which is to raise revenue by a license tax; but to do so in the other class of cases is essential to the main purpose, whether it be to prevent fraudulent sale of spurious and hurtful commodities, to secure the public health, or protect public morals.

That a penalty implies prohibition in such case as this, though there be no prohibitory words in the statute, has been decided, not only by this court in *Lindsey v. Rutherford*, but by numerous courts in England, as well as in this country. In *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671, the same question arose as the one before us, and as to construction of a statute enacted for the same purpose and in all respects like the one we are now considering, and the contract was held void. There, upon authority of a previous case in the same court, the proposition of law already referred to was thus stated: "It has

been repeatedly determined that a penalty inflicted by a statute upon an offense implies a prohibition, and a contract relating to it is void, even where it is not expressly declared by the statute that the contract shall be void." In *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845, was determined the proper construction and meaning of a statute like the one in question, and it was held that "when a merchant sold a fertilizer without a tag stating its chemical composition, etc., as required by the statute under penalty, and took a note for the purchase money, he could maintain no action on the note." Under a similar statute in Georgia, it was likewise held that an action could not be maintained for the purchase price of a fertilizer sold by a merchant who had violated provisions of the statute; and such must be the logical conclusion from the legal propositions referred to, which are sustained by courts and text writers generally.

Counsel for appellees call our attention to the cases of *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901 and *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720. But in the first case it was said that, "where the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void;" and in the other it was conceded "that, as a general rule, a contract founded on an act forbidden by a statute, under a penalty, is void, although it be not expressly declared to be so;" and the decision of the case turned upon the meaning of the various parts of the statute, which, considered together, in opinion of the court, authorized the conclusion that the legislature did not intend to avoid a contract made in contravention of it. But there can be, we think, no question of the intention of the legislature in this case; for, in language too plain to be misunderstood, the statute makes compliance with each provision thereof an indispensable condition of the right of any person or company to sell, offer, or expose for sale in this state any commercial fertilizer the retail price of which is more than \$10 per ton; and according to what rule of government or administration of justice a party who has refused to comply with that condition can ask enforcement of a contract so distinctly prohibited we are unable to see.

It appears from the evidence that a sample of the fertilizer was analyzed by the Kentucky agricultural experimental station in January, 1888, and it is contended the statute was thereby substantially complied with. But no record of the analysis is required by the statute to be kept by the director; nor is there any other way provided by which the fact of analysis can be made known to a purchaser, or preserved as a guide or check, except by means of the label, upon which a certified analysis was required to be placed. It seems to us the attaching of the label to each package is essential to accomplish the purposes of the statute, and its provisions cannot be regarded as complied with without the label being so attached.

The defendants, in counterclaim, ask for damages; but it is hard to see how they have been damaged, in view of the fact they have

used the fertilizer, and paid nothing for it; wherefore the judgment is reversed, and cause remanded for a new trial, consistent with this opinion.

(B) Particular Agreements in Breach of Statute

(a) REGULATING TRADE, PROFESSION, OR BUSINESS

See Van Meter v. Spurrier, *supra*, p. 222.

(b) CONTRACTS IN BREACH OF SUNDAY LAWS

HANDY v. ST. PAUL GLOBE PUB. CO.

(Supreme Court of Minnesota, 1889. 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695.)

GILFILLAN, C. J. The action is upon a contract pleaded in the complaint, not in hæc verba, but according to its supposed effect. The answer denied it; and, on the trial, the plaintiff offered in evidence a written contract between the parties, the provisions of which material to this controversy were as follows:

The plaintiff, in consideration of being allowed the difference between the rates he might charge for advertising in the various issues of the St. Paul Globe newspaper and the rates thereafter mentioned, agreed and contracted to take entire charge and control of the real-estate advertising business in the daily and Sunday and weekly Globe, and the defendant agreed, in consideration of such services, to put under his full charge and control all real-estate advertising business of defendant in the daily and Sunday and weekly Globe. The plaintiff agreed to pay the defendant certain specified rates for said real-estate advertising, and the defendant agreed to receive said rates as full payment for all said real-estate advertisements which might appear in the daily, weekly, or Sunday Globe, without regard to the amount plaintiff might charge and receive from advertisers. The contract was to continue for the term of five years, with the option in plaintiff to renew it for another term of five years, or for a shorter time; he to have the right to annul the agreement on giving 30 days' notice of his intention to do so.

It was admitted by plaintiff, at the time of making the offer of this contract, that the Sunday Globe referred to in the contract was issued,

published, and circulated on Sundays, though set up and printed on Saturdays. The contract was objected to as void upon its face for want of mutuality, and as being against public policy; and it appears to have been argued that it was against public policy because it was an agreement for a violation of the law in regard to Sunday. The court below sustained the objection. The plaintiff, of course, failed in his action, and he appeals from an order denying his motion for a new trial. The same objections are made to the contract here as were made below. The plaintiff contends that, not having pleaded the illegality of the contract, defendant could not assert it on the trial.

It is sometimes necessary to plead the facts upon which the illegality of a contract or transaction depends, but it is never necessary to plead the law. When the facts appear, either upon the pleadings or proofs, either party may insist upon the law applicable to such facts. In this case the plaintiff had, under the pleadings, to prove the contract upon which he sued. If it be void on its face he, not the defendant, showed its illegality. Though the contract appears in some respects a much more favorable one to the plaintiff than to the defendant, it is not wanting in mutuality of promises and engagements, so as to be without mutual considerations. What plaintiff is to do appears by implication rather than by express terms. Fairly construed, the contract created the relation of principal and agent between the defendant, as principal, and the plaintiff, as agent, for the management of defendant's real-estate advertising business,—that is, in the charge of procuring advertisements for so much of the space in defendant's paper as it devoted to real-estate advertising,—and in this business there would arise the duty in the contract. There was, by implication, the promise of plaintiff to manage the business faithfully, and with due regard to the interest of his principal.

The question of the legality of the contract is, therefore, squarely presented; and with a view to that question, and to some propositions that are made in connection with it, it is necessary to say that the contract is entire, so that any taint of illegality in one part affects the whole of it. There is no way of severing it, so we can say that, although its stipulations as to the Sunday Globe may be in violation of law, and therefore void, yet those as to the daily and weekly Globe may be upheld, or so that, although for what was to be done under it prior to January 1, 1886, when the Penal Code went into effect, it was void, it might yet be upheld for all that it provided for after that date. To attempt that would be to attempt making another contract for the parties,—one that the present contract furnishes no reason to suppose they would have made for themselves. All of the provisions of the contract must, therefore, stand or fall together.

The plaintiff insists that the contract was not illegal, for it neither was executed on Sunday nor required plaintiff or defendant to do anything on Sunday. It bound defendant to maintain and issue a weekly, a daily, and Sunday Globe for the time specified in it, and it

required plaintiff's services in the preparation and procuring, so far as related to the real-estate advertisements, of material for each of those editions of the paper. According to the terms of the contract, the defendant was no more at liberty to discontinue its Sunday edition than to discontinue its daily or weekly edition, or all its editions. The theory of the complaint is that it was bound to continue them all; so that, if to issue, publish, and circulate a newspaper on Sunday was against the law as it existed when this contract was made, then the parties contemplated and stipulated for a violation of the law by each. The law in reference to Sundays, in force at the time when the contract was made, was section 20, c. 100, Gen. St. 1878, as follows: "No person shall keep open his shop, warehouse, or work-house, or shall do any manner of labor, business, or work, except only works of necessity and charity, * * * on the Lord's day, commonly called 'Sunday,' and every person so offending shall be punished by a fine," etc.

A contract which requires or contemplates the doing of an act prohibited by law is absolutely void. No cases of the kind have been more frequently before the courts than contracts which were made on Sunday, or which required or provided that something prohibited by the statute should be done on Sunday; and in no instance has any court failed to declare such a contract void. Unless the issuing and circulating a newspaper on Sunday is, within the meaning of the statute, a work of necessity, it is prohibited by it as much as any other business or work. The newspaper is a necessity of modern life and business, but it does not follow that to issue and circulate it on Sunday is a necessity. There are a great many other kinds of business just as necessary; many, indeed most, kinds of manufacturers and mercantile business are indispensable to the present needs of men, but no one would say that, because necessary generally, the prosecution of such business on Sunday is a work of necessity. That carrying on any business on Sunday may be profitable to the persons engaged in it; that it may serve the convenience or the tastes or wishes of the public generally, —is not the test the statute applies. To continue on that day the sale of dry-goods or groceries, or the keeping open of market, saloons, theaters, or places of amusement, might be regarded by many as convenient and desirable, but that would not bring such business within the exception in the statute.

At the time this contract was made, the issuing, publishing, and circulating a newspaper on Sunday was contrary to law; and as the contract provided for that, and as it was indivisible, it was thereby rendered wholly void. The Penal Code went into effect January 1, 1886. Section 229 provides that certain kinds of articles, among them newspapers, may be sold in a quiet and orderly manner on Sunday. Plaintiff contends that the recognition of this contract, and the continuance of business under it for more than a year after the issuance of the Sunday paper, became legal by the provisions of the Penal Code, con-

stituted such a ratification of the contract as relieved it of any original taint of illegality. There is a difference in the decisions on the question whether a contract, void merely because it was made on Sunday, may be ratified on a secular day, so as to become valid; but there is no conflict of decisions on the proposition that a contract, void because it stipulates for doing what the law prohibits, is incapable of being ratified. That is this case. The contract contemplated the doing what the law then in force prohibited, and for that reason it was void. It is true the law was so changed after the contract was made that, from the time of the change, it became, as plaintiff claims, lawful to do those things provided in the contract which were unlawful at the time it was made, and so that, as he claims, a contract like this, made after the change went into effect, would have been valid. But that could not affect the validity of the previous contract, which was void from the beginning. The parties might have made a new contract to commence on or after January 1, 1886; but, because of the illegality in it, they could not at any time ratify this contract from the beginning; and, because it is entire and indivisible, they could do nothing amounting to less than the making of a new contract, which could give vitality to it for the time since January 1, 1886.

An entire contract must be ratified, if at all, as an entirety. Order affirmed.

(c) USURY

BLAKE v. YOUNT et al.

(Supreme Court of Washington, 1906. 42 Wash. 101, 84 Pac. 625, 114 Am. St. Rep. 106, 7 Ann. Cas. 487.)

Action by J. W. Blake against B. H. Yount and others. From a judgment for plaintiff, defendants appeal.

DUNBAR, J. This was an action on a promissory note secured by a real estate mortgage. The defense is (1) that the note was usurious; (2) that the court erred in not finding sufficient payment.

The essential part of the note is as follows: "\$1,000.00. Wilbur, Wash., March 25, 1899. For value received, one year after date, I promise to pay at Wilbur, Wash., to the order of Isaac B. Armstrong, one thousand dollars in gold coin of the United States of America of the present standard value, with interest thereon at the rate of 10 per cent. per annum from date until paid. If not paid when due the interest to be added to and become a part of the principal, and the whole sum of both principal and interest to bear interest thereafter at 12 per cent. per annum."

Section 3669, 1 Ballinger's Ann. Codes & St., provides: "Any rate of interest not exceeding twelve per centum per annum agreed to in

writing by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve per centum per annum." And subsequent sections provide the penalty.

We do not think that the appellants' contention that this loan was usurious can be sustained. Nor is his contention sustained by the cases cited.

In the case of *Brown v. Crow* (Tex. Civ. App.) 29 S. W. 653, upon which appellants strongly rely, the note in question was as follows: "\$200.00. Austin, Texas, September 12, 1892. Four months after date for value received, I, we, or either of us promise to pay Osceola Archer, or order, in Austin City, Texas, at his law office the sum of \$200.00, with interest thereon from date until paid at the rate of ten per cent. per annum, interest to be paid semiannually, and in default thereof the same shall become principal and bear the same rate of interest," etc. Under the Texas statute, 10 per cent. was the maximum rate of interest allowed; and it will readily be seen that, under the conditions of the note in that case, the whole amount of interest for a year would have been \$20.50 instead of \$20, which was the largest amount which the law would permit on the sum of \$200, and was plainly obnoxious to the statute. But in this case the interest is not to be paid until the end of the year, and when so paid would fall short of the maximum amount, \$20. It is true that, after the expiration of the year, the interest would be at the rate of 12 per cent. on the \$1,000 loaned, and on the accrued interest of \$100, or the legal rate of interest on \$1,100. But the extra \$100 would belong at the maturity of the note to the lender, and not to the borrower; that amount he has legally earned, and we see no reason why he should not have the benefit of it. It is within the power of the borrower to avoid paying interest on this extra \$100 by paying it to its legal and equitable owner, and if, instead of paying it, he appropriates it to his own use, there is no reason why he should not pay interest on it the same as upon the original sum.

It was evidently not the intention of the Supreme Court of Texas to hold, in *Brown v. Crow*, supra, that the compounding of interest created usury, for the same court (60 S. W. 478), in the case of *Geisberg v. Mut. Bldg. & Loan Ass'n*, in discussing this question of usury, said: "* * * It certainly cannot be held that a contract is usurious simply because, under its provisions, legal interest might be demanded upon overdue interest agreed to be paid in such contract. In such case the overdue interest becomes a separate interest demand from the principal of the contract, and the interest charged upon it cannot be added to or considered a part of the interest stipulated to be paid upon the principal, so as to make the contract usurious."

Miller v. Life Ins. Co., 118 N. C. 612, 24 S. E. 484, 54 Am. St. Rep. 741, is a case where a life insurance company lent to a borrower a sum

of money at the full legal rate of interest, payable monthly, its repayment being amply secured by mortgage on real estate, but required the borrower, in addition to and as a condition of the lease, to take from and reassign to it an endowment policy for a sum equal to the amount of the loan upon which the premiums should be paid monthly for seven years (or until his death); the payment of the premiums being also secured by the mortgage. There it was rightly held, we think, that the transaction was usurious; that it was the intent or purpose of the lender of the money to get more than the legal rate of interest for the loan; and the court properly stated that, if there be a provision, a condition, or a contingency in, or connected with, the contract, by which he may do so, the transaction is usurious. It was also stated in that case that if the usurious character of a transaction is not manifest upon its face, but depends on facts and circumstances connected with the transaction as a part of the *res gestæ*, it is a question of fact as well as of law, and should be submitted to the jury.

Watson v. Mims, 56 Tex. 451, was a case where a note was given for \$800, with interest at the rate of 20 per cent. per annum. A partial payment was afterwards made, and a new note given for the principal and unpaid interest, amounting to \$960, with interest thereon at the same rate; the law having in the meantime made a greater rate than 12 per cent. usurious. It was held that the second note was not a mere renewal of the previous one, but was a new and illegal contract by reason of the excessive rate of interest charged on the previously accrued interest. It is manifest that this decision was right, but it in no way tends to establish the fact that the note under discussion in this case is usurious. And so we think with all the other cases cited by the appellants—that none of them sustain the contention.

As showing that the note is not usurious, the respondent cites: *Hager v. Blake*, 16 Neb. 12, 19 N. W. 780; *Crapo v. Hefner*, 53 Neb. 251, 73 N. W. 702; *Havemeyer v. Paul*, 45 Neb. 373, 63 N. W. 932; *Geisberg v. Mut. Bldg. & Loan Ass'n* (Tex. Civ. App.) 60 S. W. 478; *Martin v. Bank*, 5 Tex. Civ. App. 167, 23 S. W. 1032; *Stewart v. Petree*, 55 N. Y. 621, 14 Am. Rep. 352; *Hale v. Hale*, 1 Cold. (Tenn.) 233, 78 Am. Dec. 490; *Gilmore v. Bissell*, 124 Ill. 488, 16 N. E. 925; *Bledsoe v. Nixon*, 69 N. C. 89, 12 Am. Rep. 642. These cases also support the contention that the simple compounding of interest is not usurious, and that wherever the debtor by the terms of the contract can avoid the payment of the larger by the payment of the smaller sum at an earlier date, the contract is not usurious, but additional, and the larger sum becomes a mere penalty.

The rule is stated in 29 Am. & Eng. Enc. Law (2d. Ed.) p. 507, as follows: "Stipulations to the effect that if the debt be not paid at maturity it shall draw interest thereafter at a rate greater than the statutory limit are now generally regarded as penalties to induce prompt payment, and, as the debtor has it in his power to avoid pay-

ing the penalty by discharging the debt when due, such agreements are held to be free from usury."

Of course, if it appears upon the face of the transaction that there is any trick or device or subterfuge by which the borrower is compelled, in order to get the money, to pay a larger amount of interest than is allowed by the statute, the note will be determined to be usurious; as, for instance, where the interest is computed in advance and added to the principal, and the maximum rate of interest charged on the principal and interest so compounded. In such case it is evident that the borrower is compelled to pay more than the maximum rate of interest prescribed by the statute, because the form of the note can in no wise change the legal character of the contract. Or, if the interest is to be paid so often and if not so paid compounded, and it is evident that the intention is to obtain more than the legal rate of interest, the result would be the same.

But in this case, where the interest is not due or payable until the end of a year, the cycle of time which is taken notice of by the statute, the borrower has the privilege of paying the interest at that time, and we see no reason for holding the note usurious. Nor are we able to discover from the record that the court erred in finding the amount that was paid upon the note. The judgment is affirmed.

(d) WAGERS AND GAMBLING TRANSACTIONS

In re TAYLOR & CO.'S ESTATE.

Appeal of HOWARD.

(Supreme Court of Pennsylvania, 1899. 192 Pa. 304, 43 Atl. 973, 73 Am. St. Rep. 812.)

Claim of William H. Howard against the assigned estate of L. H. Taylor & Co. The auditor disallowed the claim, and exceptions thereto were dismissed by the court, and claimant appeals.

MITCHELL, J. It has been settled by this court, so often that it ought not to require reiteration, that dealing in stocks, even on margins, is not gambling. Stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, to sell on an expected rise, or sell "short," to acquire and deliver on an expected fall, and it will not be gambling.

Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The

test is, did he intend to buy, or only to settle on differences? If he had bought and paid for his stock, held it for a year, and then sold, no one would call it gambling; and yet it is just as little so, if he had it but an hour and sold before he had in fact paid for it. And so with selling. Every merchant who sells you something not yet in his stock, but which he undertakes to get for you, is selling "short"; but he is not gambling, because, though delivery is to be in the future, the sale is present and actual.

The true line of distinction was laid down in *Peters v. Grim*, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599, and has not been departed from or varied: "A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A., and borrows the money from B. to pay for it, there is no element of gambling in the operation, though he pledges the stock with B. as security for the money. So, if instead of borrowing the money from B., a third person, he borrows it from A., or, in the language of brokers, procures A. to 'carry' the stock for him, with or without margin, the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties intended there should ever be a purchase or delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices; but if there was, in good faith, a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin, or otherwise, in the meanwhile, without affecting the legality of the operation."

This has been uniformly followed. *Hopkins v. O'Kane*, 169 Pa. 478, 32 Atl. 421; *Wagner v. Hildebrand*, 187 Pa. 136, 41 Atl. 34. And the rule goes so far that an agreement for an actual sale and purchase will make the transaction valid, though it originated in an intention merely to wager. *Anthony v. Unangst*, 174 Pa. 10, 34 Atl. 284.

Turning now to the facts of the present case, it is clear that the law was not correctly applied by the auditor and the court below. The brokers made an assignment on December 21, 1895, on which day they held certain stock for appellant, which they had bought on his order; and he had certain other stock, which they had sold on his order, but which he had not yet delivered to them. He desired to close the account, complete the mutual deliveries, and receive the balance which the transactions left in his favor. He was entitled to do so. Even if the transactions were wagering, the agreement of the parties to make the sales actual would, under *Anthony v. Unangst*, 174 Pa. 10, 34 Atl. 284, have made them valid. It is true, the settlement was not actually made until January 10th; but it was made as of December 20th, the day before the assignment, and the auditor

reports that there had been no change of values meanwhile. The time of striking a balance on the books and delivering the stock was not important.

Delivery is not in itself a material fact. Its only value is as evidence of the intent to make a bona fide sale. If such is the intent, the delivery may be present or future without affecting validity. But there was no sufficient evidence that the transactions were illegal at any time. The auditor reports that "the stocks ordered to be bought or sold by the customers of L. H. Taylor & Co. were, as shown by their books, actually bought and sold; and, as this evidence is uncontradicted, I must and do so find. * * * Thus, so far as L. H. Taylor & Co. were concerned, the transactions were not fictitious, but were actual purchases and sales of stock." This finding should have been a warning to caution in taking a different view of the appellant's position in the transactions.

It is true, the purchase or sale may be actual on part of the broker, and merely a wager on part of the customer (see *Champlin v. Smith*, 164 Pa. 481, 487, 30 Atl. 447); but there should be at least fairly persuasive evidence of the difference. There is none here. The transactions covered by the account began with a small cash balance to appellant's credit, followed by an order to buy 200 shares of Wabash common, which were bought by the brokers, paid for by appellant, and delivered to him. The close, two years and a half later, showed, as already said, a large number of shares in the hands of the brokers bought for appellant, and of which he demanded delivery, and other shares sold for him, and which he had in his possession ready to deliver.

As to the intermediate transactions, appellant testified, "It was always the intention to buy the stocks out and out, and pay for them, and I had money to do it with." In the face of these facts and this uncontradicted testimony, the auditor found that "the account, including his enormous short sales, has all the earmarks of a gaming transaction, and I so find it." This was a mere inference, unwarranted by the account itself, and wholly opposed to all the evidence in the case.

Judgment, so far as it relates to appellant's claim, reversed, and claim directed to be allowed.

II. Agreements Contrary to Public Policy³

1. AGREEMENTS TENDING TO INJURE THE PUBLIC SERVICE

(A) Assignment of Salary or Pension by Officer,

BLISS v. LAWRENCE.

SAME v. GARDNER.

(Court of Appeals of New York, 1874. 58 N. Y. 442.)

Appeals from judgments dismissing the complaint. Defendant was a clerk in the United States treasury department, in New York City, and sold and assigned to plaintiff a month's salary in advance at a discount of ten per cent, and when the salary became due, he collected and converted it to his own use.⁴

JOHNSON, J. The controlling question in these cases is that of the lawfulness of an assignment, by way of anticipation, of the salary to become due to a public officer. The particular cases presented are of assignments of a month's salary in advance. But if these can be sustained in law, then such assignments may cover the whole period of possible service. In the particular cases before us the claims to a month's salary seem to have been sold at a discount of about ten per cent. While this presents no question of usury (since it was a sale and not a loan for which the parties were dealing), it does present a quite glaring instance and example of the consequences likely to follow the establishment of the validity of such transfers, and thus illustrates one at least of the grounds on which the alleged rule of public policy rests, by which such transfers are forbidden. The public service is protected by protecting those engaged in performing public duties; and this not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work at such periods as the law has appointed for their payment.

It is argued that a public officer may better submit to a loss in order to get his pay into his hands in advance, than deal on credit for his necessary expenses. This may be true in fact, in individual instances, and yet may in general not be in accordance with the fact. Salaries are by law payable after work is performed and not before, and while this remains the law, it must be presumed to be a wise regulation, and

³ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 156-175.

⁴ The statement of facts is abridged.

necessary in the view of the law-makers to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees by notice to the government, would on ordinary principles be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service.

Some misapprehension as to the doctrine involved seems to have arisen from the fact that the modern adjudged cases have often related to the pay of half-pay army officers, which in part is given as a compensation for past services and in part with a view to future services. Upon a review of the English cases, it will appear that the general proposition is upon authority unquestionable, that salary for continuing services could not be assigned; while a pension or compensation for past services might be assigned. The doubt, and the only doubt in the case of half-pay officers was to which class they were to be taken to belong. It was decided that inasmuch as their pay was in part in view of future service, it was unassignable. Similar questions have arisen in respect to persons not strictly public officers, but the principle before stated has in the courts of England been adhered to firmly. *Flarty v. Odum*, 3 Term R. 681; *Stone v. Lidderdale*, 2 Anst. 533; *Davis v. Marlboro*, 1 Swanst. 79; *Lidderdale v. Duke of Montrose*, 4 Term R. 248; *Barwick v. Read*, 1 H. Bl. 627; *Arbuckle v. Cowhan*, 3 Bos. & P. 328; *Wells v. Foster*, 8 Mees. & W. 149; *Story*, Eq. Jur. § 1040d; 1 Pars. Cont. 194. These cases and writers sustain the proposition above set forth and show the settled state of the English law upon the subject.

Some other cases are so pertinent to the general discussion as to deserve to be stated more at length, especially as they are not so accessible as those before referred to. Among them the judgment of Lord Brougham, in the house of lords, in *Hunter v. Gardner*, 6 Wils. & S. 618, decided in 1831, gives an admirable summary of the state of the English law upon the subject. The case was a Scotch appeal, in which the Scotch court had approved, under the law of that country, a partial transfer of the salary of a public officer. The particular judgment was affirmed without deciding what the law of Scotland was upon the subject. In his judgment Lord Brougham said: "The court seem not to have scrutinized very nicely whether from the nature of the subject-matter, namely, the half-pay or the full pay of

an officer or a minister's stipend, or in the present case, the salary of an officer employed under government and in the execution of an important public trust an assignment can validly operate upon and affect those particular rights; but they have nevertheless assumed to deal with them and have directed that a certain proportion of them shall be assigned on the condition of granting the benefit of the *cessio bonorum*. Those cases undoubtedly could not have occurred in this country. I may refer to the well-known case of *Flarty v. Odlum*, 3 Term R. 681, which from its importance was the subject of much discussion it being the first case in which it was held that the half-pay of an officer was not the subject of assignment; and it was followed in *Lidderdale v. Duke of Montrose*, in 4 Term R., where the doctrine laid down was made the subject of further discussion, and the court adhered to their former view, that the half-pay was free from attachment; so that neither is a man bound to put it into the schedule of his assets, nor does the general assignment to the provisional assignee transfer it, nor would a bargain and sale to the assignees under a commission of bankruptcy pass it out of the bankrupt; it is unassignable and incapable of being affected by any of those modes of proceeding. The same doctrine was laid down with respect to the profits of a living in the case of *Arbuckle v. Cowhan*, the judgment in which has been very much considered in Westminster Hall, and like most of the judgments of that most able and learned lawyer, Lord Alvanley has given great satisfaction to the courts and the profession. In the report of that case, your lordships will find laid down the general principle, though, perhaps, not worked out in these words, that all such profits as a man receives in respect to the performance of a public duty are, from their very nature, exempt from attachment and incapable of assignment, inasmuch as it would be inconsistent with the nature of those profits that he who had not been trusted, or he who had not been employed to do the duty, should nevertheless receive the emolument and reward. Lord Alvanley quotes *Flarty v. Odlum* and *Lidderdale v. Duke of Montrose*, and in illustrating the principle on which a parson's emoluments are not assignable, he does not confine his observations to the particular case of half-pay officers or the case of a parson's emoluments, but he makes the observation in all its generality, as applicable to every case of a public office and the emoluments of that office. The first case (1 H. Bl. 627), decided by the court of common pleas (the case of *Barwick v. Read*), clearly recognizes the principle. * * * In this case as well as the other case of *Arbuckle v. Cowhan*, it was perfectly clearly held by the court that in all such cases, one man could not claim to receive, by assignment or attachment, emoluments which belonged to another deemed to be capable of performing the duties appended to those emoluments, but which duties could not be performed by the assignee: and there was an old case referred to in *Barwick v. Read*, and a curious case in *Dyer*, in which so long ago as the reign of Elizabeth, the question ap-

pears to have been disposed of by a decision now undisputed, and now referred to in Westminster Hall. * * * All these cases laid down this principle, which is perfectly undeniable, that neither attachment nor assignment is applicable to such a case."

Other cases to the same effect, of later date, are likewise noteworthy. In *Hill v. Paul*, 8 Clark & F. 307, decided in 1842, Lord Chancellor Lyndhurst, speaking of the legality of assigning the future emoluments of an office in Scotland, says: "That such an assignment would be illegal in England there can be no doubt. *Palmer v. Bate*, 2 Brod. & B. 673, is directly applicable to this case. And in *Davis v. Marlboro*, 1 Swanst. 79, there is the observation of Lord Eldon already cited, which seems to me quite in point and which lays down the true rule and the distinction to be observed in these cases, and to which for that reason I refer as showing what is the law of England on this subject." What Lord Eldon said in the case referred to was: "A pension for past services may be aliened; but a pension for supporting the grantee in the performance of future duties is inalienable." And in *Flarty v. Oldlum*, 4 Term R. 248, the court say: "It might as well be contended that the salaries of the judges which are granted to support the dignity of the state and the administration of justice may be assigned."

In *Arbuthnot v. Norton* (1846) 5 Moore, P. C. 230, the question was whether an Indian judge could assign a contingent sum to which on his death within six months after his arrival in India his representative would be entitled by law, and it was held that such an assignment was not against public policy and would in equity transfer the right to the fund. In the course of the judgment given by Dr. Lushington, he says: "We do not in the slightest degree controvert any of the doctrines whereupon the decisions have been founded against the assignment of salaries by persons filling public offices; on the contrary, we acknowledge the soundness of the principles which govern those cases but we think that this case does not fall within any of these principles; and we think so because this is not a sum of money which at any time during the life of Sir John Norton could possibly have been appropriated to his use or for his benefit, for the purpose of sustaining with decorum and propriety the high rank in life in which he was placed in India. We do not see how any of the evils which are generally supposed would result from the assignment of salary, could in the slightest degree have resulted from the assignment of this sum, inasmuch as during his life-time his personal means would in no respect whatever have been diminished, but remain exactly in the same state as they were."

In *Liverpool v. Wright*, 28 L. J. (N. S.) Ch. 871, A. D. 1859, in which the question related to the alienability of the fees of the office of a clerk of the peace, Wood, V. C., after disposing of another question, says: "Then there is a second ground of public policy, for which the case of *Palmer v. Vaughn*, 3 Swanst. 173, is the leading

authority, which is this: That independently of any corrupt bargain with the appointor, nobody can deal with the fees of a person who holds an office of this description, because the law presumes, with reference to an office of trust, that he requires the payment which the law has assigned to him for the purpose of upholding the dignity and performing properly the duties of that office, and therefore it will not allow him to part with any portion of those fees either to the appointor or to anybody else. He is not allowed to charge or incur them. That was the case of *Parsons v. Thompson*, 1 H. Bl. 322. Any attempt to assign any portion of the fees of his office is illegal on the ground of public policy, and held therefore to be void."

In respect to American authority we have been referred to *Brackett v. Blake*, 7 Metc. (Mass.) 335, 41 Am. Dec. 442; *Mulhall v. Quinn*, 1 Gray (Mass.) 105, 61 Am. Dec. 414, and *Macomber v. Doane*, 2 Allen (Mass.) 541, as conflicting with the views we have expressed. An examination of these cases shows that the point of public policy was not considered by the court in either of them, but that the question was regarded as entirely relating to the sufficiency of the interest of the assignor in the future salary to distinguish the cases from those of attempted assignments of mere expectation, such as those of an expectant heir. The court held that in the cases cited, the expectation of future salary being founded on existing engagements, was capable of assignment and that the existing interest sufficed to support the transfer of the future expectation. The only other case to which we have been referred is a decision of the supreme court of Wisconsin.

In *State Bank v. Hastings*, 15 Wis. 78, the question being as to the assignability of a judge's salary, the court say: "We were referred to some English cases which hold that the assignment of the pay of officers in the public service, judges' salaries, pensions, etc., was void as being against public policy, but it was not contended that the doctrine of those cases was applicable to the condition of society or to the principles of law or of public policy in this country. For certainly we can see no possible objection to permitting a judge to assign his salary before it becomes due, if he can find any person willing to take the risk of his living and being entitled to it when it becomes payable."

We do not understand that the English decisions really rest on any grounds peculiar to that country, although sometimes expressed in terms which we might not select to express our views of the true foundation of the doctrine in question. The substance of it all is the necessity of maintaining the efficiency of the public service by seeing to it that public salaries really go to those who perform the public service. To this extent we think the public policy of every country must go to secure the end in view.

The judgments must be affirmed. All concur. Judgments affirmed.

(B) Lobbying Contracts

TRIST v. CHILD.

(Supreme Court of the United States, 1874. 21 Wall. 441, 22 L. Ed. 623.)

Appeal from the supreme court of the District of Columbia; the case being thus:

N. P. Trist having a claim against the United States for his services, rendered in 1848, touching the treaty of Guadalupe Hidalgo—a claim which the government had not recognized—resolved, in 1866–7 to submit it to congress and to ask payment of it. And he made an agreement with Linus Child, of Boston, that Child should take charge of the claim and prosecute it before congress as his agent and attorney. As a compensation for his services it was agreed that Child should receive 25 per cent. of whatever sum congress might allow in payment of the claim. If nothing was allowed, Child was to receive nothing. His compensation depended wholly upon the contingency of success. Child prepared a petition and presented the claim to congress. Before final action was taken upon it by that body Child died. His son and personal representative, L. M. Child, who was his partner when the agreement between him and Trist was entered into, and down to the time of his death, continued the prosecution of the claim. By an act of the 20th of April, 1871, congress appropriated the sum of \$14,559 to pay it. The son thereupon applied to Trist for payment of the 25 per cent. stipulated for in the agreement between Trist and his father. Trist declined to pay. Hereupon Child applied to the treasury department to suspend the payment of the money to Trist. Payment was suspended accordingly, and the money was still in the treasury.

Child, the son, now filed his bill against Trist, praying that Trist might be enjoined from withdrawing the \$14,559 from the treasury until he had complied with his agreement about the compensation, and that a decree might pass commanding him to pay to the complainant \$5,000, and for general relief.

The defendant answered the bill, asserting, with other defences going to the merits, that all the services as set forth in their bill were “of such a nature as to give no cause of action in any court either of common law or equity.”

The case was heard upon the pleadings and much evidence. A part of the evidence consisted of correspondence between the parties. It tended to prove that the Childs, father and son, had been to see various members of congress, soliciting their influence in behalf

of a bill introduced for the benefit of Mr. Trist, and in several instances obtaining a promise of it. There was no attempt to prove that any kind of bribe had been offered or ever contemplated; but the following letter, one in the correspondence put in evidence, was referred to as showing the effects of contracts such as the one in this case: "From Child, Jr., to Trist. House of Representatives, Washington, D. C., Feb. 20th, 1871. Mr. Trist: Everything looks very favorable. I found that my father has spoken to C—— and B——, and other members of the House. Mr. B—— says he will try hard to get it before the House. He has two more chances, or rather 'morning hours,' before Congress adjourns. A—— will go in for it. D—— promises to go for it. I have sent your letter and report to Mr. W——, of Pennsylvania. It may not be reached till next week. Please write to your friends to write immediately to any member of Congress. Every vote tells; and a simple request to a member may secure his vote, he not caring anything about it. Set every man you know at work, even if he knows a page, for a page often gets a vote. The most I fear is indifference. Yours, &c., L. M. Child."

The court below decreed:

1st. That Trist should pay to the complainant \$3,639, with interest from April 20th, 1871.

2d. That until he did so, he should be enjoined from receiving at the treasury "any of the moneys appropriated to him" by the above act of congress, of April 20th, 1871.

From this decree the case was brought here.

The good character of the Messrs. Child, father and son, was not denied.

Mr. Justice SWAYNE,⁵ delivered the opinion of the court. * * *

But there is an objection of still greater gravity to the appellee's case.

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." Just. Inst. lib. 3, tit. 19, par. 24. In our jurisprudence a contract may

⁵ A portion of the opinion is omitted.

be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said (*Jones v. Randall*, 1 Cowp. 39): "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are: An agreement to pay for supporting for election a candidate for sheriff, *Swayze v. Hull*, 8 N. J. Law, 54, 14 Am. Dec. 399; to pay for resigning a public position to make room for another, *Eddy v. Capron*, 4 R. I. 395, 67 Am. Dec. 541; *Parsons v. Thompson*, 1 H. Bl. 322; to pay for not bidding at a sheriff's sale of real property, *Jones v. Caswell*, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134; to pay for not bidding for articles to be sold by the government at auction, *Doolin v. Ward*, 6 Johns. (N. Y.) 194; to pay for not bidding for a contract to carry the mail on a specified route, *Gulick v. Ward*, 10 N. J. Law, 87, 18 Am. Dec. 389; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself, *Gray v. Hook*, 4 N. Y. 449; to pay for procuring a contract from the government, *Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868; to pay for procuring signatures to a petition to the governor for a pardon, *Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 31 Am. Dec. 750; to sell land to a particular person when the surrogate's order to sell should have been obtained, *Overseers of Bridge-water v. Overseers of Brookfield*, 3 Cow. (N. Y.) 299; to pay for suppressing evidence and compounding a felony, *Collins v. Blantern*, 2 Wils. 347; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution, *Boynton v. Hubbard*, 7 Mass. 112; to pay for promoting a marriage, *Scribblehill v. Brett*, 4 Brown Parl. Cas. 144; *Arundel v. Trevillian*, 1 Ch. Rep. 47; to influence the disposition of property by will in a particular way, *Debenham v. Ox*, 1 Ves. 276. See, also, *Add. Cont.* 91; 1 Story, Eq. c. 7; *Collins v. Blantern*, 1 Smith Lead. Cas. 676, Am. note.

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. *Clippinger v. Hephaugh*, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; *Harris v. Roof's Ex'r*, 10 Barb. (N. Y.) 489; *Rose & Hawley v. Truax*, 21 Barb. (N. Y.) 361; *Marshall v. Railroad Co.*, 16 How. 314, 14 L. Ed. 953. We entertain no doubt that in such cases, as under all other

circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Montesq. Spirit of Laws, 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the later character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *protior conditio defendantis*. Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to dismiss the bill.

2. AGREEMENTS PROMOTIVE OF NONOFFICIAL CORRUPTION

LIVINGSTON v. PAGE.

(Supreme Court of Vermont, 1902. 74 Vt. 356, 52 Atl. 965, 59 L. R. A. 336, 93 Am. St. Rep. 901.)

Action of assumpsit by James H. Livingston against Carrol S. Page. From a judgment for the defendant, the plaintiff brings exceptions.

MUNSON, J. At the close of the plaintiff's evidence the defendant moved that a verdict be directed in his favor, on the ground that the contract claimed by the plaintiff was void, as against public policy. The court held the contract void for the reason assigned, and directed a verdict accordingly. The case is here upon the plaintiff's exception to this holding.

The plaintiff called the defendant as a witness. The evidence consisted of certain correspondence had by the parties; and the testimony of the parties as to the circumstances in which the letters were written, the meaning that was attached to the language used, the matters inclosed for publication by one party and the services rendered by the other, and subsequent transactions bearing upon their understanding of the relations they had sustained. The defendant claimed that no contract with the plaintiff was in fact consummated, and that only contract ever contemplated was one for the publication of extracts from other papers at a legitimate charge for the space actually taken. The plaintiff did not claim to recover on this ground, but claimed to recover a reasonable compensation for the support and influence of his paper and his services as its editor.

The plaintiff was a Democrat, publishing a Democratic paper of independent proclivities. The defendant was a Republican, seeking a nomination to congress from a Republican convention. It appeared from the plaintiff's testimony that he considered defendant's proposal an application for the use and influence of his paper in the nature of a retainer; that he accepted it with the understanding that

his paper and his services as editor would be at the command of the defendant during the campaign to be settled for at its close; that he was to do all he could to influence the choice of delegates and secure the defendant's nomination; that original matter was within the scope of his contract, and that his editorials were written in that view; that he supported defendant because of this contract and the money he was to get out of it; that he expected to receive a larger compensation if defendant was nominated than he otherwise would; that he tried to conceal his relations with the defendant from the public, and understood that the defendant was trying to do the same; that he took this course because it would make his efforts in influencing voters in defendant's behalf more successful.

The case of *Nichols v. Mudgett*, 32 Vt. 546, decided by this court in 1860, is one of the few cases bearing upon this subject. The plaintiff in that case was a candidate for the office of town representative, and a creditor of the defendant. The defendant's party affiliations were such as would naturally lead him to vote for the opposing candidate. Conversations were had which resulted in a mutual understanding that the defendant should use his influence in favor of the plaintiff's election, and that, if the plaintiff was successful, the defendant's indebtedness should be treated as paid. Induced by this agreement, the defendant supported the plaintiff's candidacy until his election was declared. There was no agreement that defendant should vote for the plaintiff unless it was implied in the above understanding. He voted for the plaintiff, however, and did so because of the understanding. The suit was for the recovery of the indebtedness referred to, and the defendant claimed that it had been satisfied. The court considered that there was a sale of the defendant's influence and vote, held the agreement void, and gave judgment for the plaintiff. The agreement in that case involved both the defendant's vote and his influence upon the votes of others, but the court's discussion of the subject does not leave much doubt as to what its conclusion would have been if the undertaking had been confined to the latter service. Certainly no distinction could properly be made between the two. But that contract had reference to the votes to be cast at an election, and the plaintiff contends that, inasmuch as caucuses and conventions are not creations of the law, contracts for services in influencing the choice of delegates and the action of a convention cannot be considered against public policy.

In *Liness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153, the contract was for services of this character. It is suggested that there may have been a law in that state regulating primaries, but there is no intimation of one in the opinion, and we have found none in the examination we have been able to make. There the plaintiff sent the defendant \$20, with a request that he use his influence to get plaintiff nominated for a certain office, and a direction to call upon him

for \$20 more if he got the nomination. The defendant kept the \$20, and aided the plaintiff's opponent. The suit was to recover this money, but the defendant had judgment. The decision was announced by Justice Lawrence, who characterized the transaction as "an attempt to influence, by moneyed considerations, the action of the defendant in a matter where every person should be governed solely by a regard for the public welfare."

In *Strasburger v. Burk*, 13 Am. Law Reg. (N. S.) 607, decided by the city court of Baltimore, the defendant was the keeper of a lager beer saloon, and agreed to give his political influence and furnish beer and cigars to secure a caucus nomination for the plaintiff's father. The gratuitous furnishing of food or liquor to secure votes at an election was prohibited by the Code, but the only statutory recognition of primary elections was a provision for the preservation of order. The court considered that in applying the principles of public policy no distinction could be made between voluntary meetings of this character and elections ordained by law. Mr. McCrary adopts the conclusions of this opinion in his work on Elections, and applies the doctrine to the sale of influence, as well as the sale of votes. Mr. Redfield, in commenting upon the same opinion in 13 Am. Law Reg. (N. S.) at page 610, says that the invalidity of contracts designed to control the freedom of elections results from the principles of common law, and that those relating to caucuses cannot be made an exception on the ground that such meetings are not recognized by the statute.

We cannot doubt the correctness of this conclusion. The rule would largely fail of its purpose if not so applied. When the voters are unevenly divided into two parties, the nomination of the stronger organization is usually equivalent to an election. And when party action is less decisive the subsequent efforts of the voters are ordinarily confined to a selection from the candidates regularly presented. The individual voter of a large electorate can seldom give an effective expression to a choice that is not in line with the action of some party convention. To secure a free and exact expression of the sovereign will, there must be a proper selection of candidates, as well as an honest election. If the choice of delegates and the action of the nominating convention are improperly determined, the election ballots will fail to express the real judgment of the voters.

It is not claimed in argument, and no ground occurs to us upon which it could be claimed, that this contract was any the less obnoxious to the law because the purchased influence was to be exerted through the columns of the plaintiff's paper. A newspaper is understood to present the views of some one connected with its management or views deemed consistent with some settled policy, and has a patronage and influence which are due to that understanding. As long as the editorial column is relied upon as a public teacher and adviser, there can be no more dangerous deception than that resulting from the secret purchase of its favor. We hold that the contract

testified to and relied upon by the plaintiff is contrary to public policy, and therefore void.

Judgment affirmed.

NOTE.—Since the delivery of the above opinion, we have seen *Fitch v. De Young*, 66 Cal. 339, 5 Pac. 364, where it was held, upon views similar to those expressed in concluding the opinion, that an article charging a publisher with selling the support and advocacy of his paper for money is libelous.

3. AGREEMENTS TENDING TO PERVERT OR OBSTRUCT PUBLIC JUSTICE

(A) Compounding Crime

JONES v. RICE.

(Supreme Judicial Court of Massachusetts, 1837. 18 Pick. 440,
29 Am. Dec. 612.)

Assumpsit on a promissory note, dated January 1st, 1835, made by the defendant to the plaintiff, for \$147.

At the trial, before Shaw, C. J., it appeared that on the night of December 31st, 1834, a ball was given at the house of Joel Jones, in Sudbury; that an attempt was made by the defendant and others, to interrupt the ball by violence; that a riot ensued, in which some injury was done to J. Jones and others, assembled at the ball; that a complaint was filed before a justice of the peace and a warrant issued by him against some of the rioters; that the persons assembled at the ball chose a committee to report on the terms which should be proposed to the accused, for a settlement of the difficulty; that the committee reported that the accused should pay the sum of \$184; that of this amount the sum of \$40 was for damages sustained by three individuals, \$10 for the services of the officer, and \$2 for the services of the magistrate, and that the balance was for the purpose of stopping that and other prosecutions; that it was thereupon voted by those assembled at the ball, that if the accused would pay the sum proposed or give security for it, the other party would do nothing more about the matter; that the accused agreed to the terms and paid about \$40, and the defendant, at their request, gave the note in suit for the balance; that J. Jones and others, including the plaintiff, then signed a receipt "in full for all damages sustained by the ball party assembled, &c. and all other demands of any name or nature of said ball party"; and that in consequence of this arrangement the officer made no return of the warrant, and no further proceedings were had upon the complaint.

The Chief Justice was of opinion, that the plaintiff was not entitled to recover, because the evidence proved a want of consideration or a bad consideration for the note; and the plaintiff consented to a nonsuit, subject to the opinion of the whole court.

PUTNAM, J. delivered the opinion of the court. The facts reported disclose, that divers persons committed an aggravated riot and assault upon the plaintiff and others, and that the note was given partly for the damages and expenses which the plaintiff and others had sustained, and partly for their agreement no further to prosecute for the offence against the public. The sum of \$52 was given for the damages and expenses, and \$132 for the compounding of the misdemeanor; part was paid in money, and the balance was secured by the note now sued.

Cases have been cited from the English authorities which sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors which is alleged to be lawful; but it appears that there is a conflict in the decisions upon this matter. In *Drage v. Ibberson*, 2 Esp. 643, Lord Kenyon held, that the consideration for settling a misdemeanor was good in law. And the case of *Fallowes v. Taylor*, 7 Term R. 745, proceeds upon the same principle. It was there held by Lord Kenyon and the rest of the court, that a bond given to the plaintiff (who was clerk of the quarter sessions and who was directed to prosecute the defendant for a public nuisance,) conditioned to remove the nuisance, was valid, notwithstanding it was taken by the plaintiff for his own use, he agreeing not to prosecute for the nuisance.

We do not think, that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. 1 Russ. Crimes, 210; *Edgcombe v. Rodd*, 5 East, 301.

The power to stop prosecutions is vested in the law officers of the commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offence, he might extort for his own use, money which properly should be levied as a fine upon the criminal party for the use of the commonwealth. The case at bar furnishes a strong illustration of the illegality of such a proceeding. The plaintiff claimed and got the note to secure to his own use four times as much as in his own estimation his individual damage amounted to. Now the sum thus secured might be more or less than the rioters would have been fined; but whether more or less is altogether immaterial; for no part of it belonged to the party. He might settle for his own damage from the

riot; but it would enable the party to barter away the public right for his own emolument, if we were to hold that the consideration of this note was lawful.

We are all of opinion that the nonsuit must stand.

(B) Reference to Arbitration

HAMILTON v. LIVERPOOL & LONDON & GLOBE INS. CO.

(Supreme Court of the United States, 1890. 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419.)

In error to the circuit court of the United States for the southern district of Ohio.

This was an action upon a policy of insurance numbered 2,907,224, against fire, for a year from September 5, 1885, upon a stock of tobacco in the plaintiff's warehouse at 413 and 415 Madison street, in Covington, in the state of Kentucky. Among the printed "conditions relating to the methods of adjustment of loss, and the payment thereof," were the following:

The tenth condition, after provisions relating to proofs of loss, certificate of a magistrate, submission to examination on oath, and production of books and vouchers, and certified copies of lost bills and invoices, further provided: "When property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value, and of the loss or damage, shall be determined by agreement between the company and the assured. But if, at any time, differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement, and the award in writing of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted, but shall not decide the liability of this company; and, until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. There can be no abandonment to the company of the

property insured, but the company reserve the right to take the whole, or any part thereof, at its appraised value."

By the eleventh condition, "it is, furthermore, hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

The answer put in issue the amount of loss, and set up that the plaintiff had not performed the conditions of the policy on his part, but had refused to submit a difference between the parties as to the amount of loss to appraisal and award as provided in the policy, and, against the defendant's protest, had sold the property insured, and deprived the defendant of its right under the policy to have an appraisal made, and to take the property, or any part thereof, at its appraised value, and had thereby waived the right to recover under the policy.

At the trial the plaintiff offered evidence tending to prove the execution of the policy, a loss by fire on April 16, 1886, occasioned by the tobacco becoming saturated and impregnated with smoke, and thereby greatly damaged, and proofs of loss in accordance with the policy. The only other evidence introduced was a correspondence between the parties at Cincinnati, the material parts of which were as follows: [Correspondence omitted.]

The court, after the case had been argued, instructed the jury that it appeared from the evidence that the defendant requested the plaintiff, in writing, to submit the amount of his loss or damage under the policy to competent and impartial persons, and the plaintiff refused so to do, and instructed the jury to return a verdict for the defendant, which was accordingly rendered. The plaintiff excepted to these instructions, and after judgment on the verdict sued out this writ of error.⁶

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and such an award ob-

⁶ The statement of facts is abridged.

tained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action. Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. *Scott v. Avery*, 5 H. L. Cas. 811; *Viney v. Bignold*, 20 Q. B. Div. 172; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Reed v. Insurance Co.*, 138 Mass. 572, 576; *Wolff v. Insurance Co.*, 50 N. J. Law. 453, 14 Atl. 561; *Hall v. Insurance Co.*, 57 Conn. 105, 114, 17 Atl. 356.

The case comes within the general rule long ago laid down by this court: "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so." *U. S. v. Robeson*, 9 Pet. 319, 327, 9 L. Ed. 142. See, also, *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255.

Upon the evidence in this case, the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and award as the policy called for, did not depend in any degree, as in *Uhrig v. Insurance Co.*, 101 N. Y. 362, 4 N. E. 745, cited for the plaintiff, on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law to be decided by the court. *Turner v. Yates*, 16 How. 14, 23, 14 L. Ed. 824; *Bliven v. Screw Co.*, 23 How. 420, 433, 16 L. Ed. 510; *Smith v. Faulkner*, 12 Gray (Mass.) 251. That correspondence clearly shows that the defendant explicitly and repeatedly, in writing, requested that the amount of the loss or damage should be submitted to appraisers, in accordance with the terms of the policy, and that the plaintiff as often peremptorily refused to do this, unless the defendant would consent in advance to define the legal powers and duties of the appraisers, which the defendant was under no obligation to do, and that the plaintiff throughout, against the constant protest of the defendant, asserted, and at last exercised, a right to sell the property before the completion of an award according to the policy, thereby depriving the defendant of the right, reserved to it by the policy, of taking the property at its appraised value, when ascertained in accordance with the conditions of the policy.

The court therefore rightly instructed the jury that the defendant

had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that the plaintiff, therefore, could not maintain this action. If the plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented. Judgment affirmed.

4. ENCOURAGEMENT OF LITIGATION—CHAMPERTY AND MAINTENANCE

THOMPSON et al. v. REYNOLDS.

(Supreme Court of Illinois, 1874. 73 Ill. 11.)

WALKER, J. Some time in the latter part of the year 1868, appellee and his partner were consulted by appellants as to whether they should execute a release, without consideration, of certain property mentioned in the deed. The partner advised that they had no interest, and could do so without prejudice to their rights; but, subsequently, another quitclaim deed was, in like manner, presented for a large amount of property. Appellee was then applied to for further advice, when he, with appellant Charles Thompson, consulted with one James Dunne, also an attorney, who occupied the same office with appellee. They investigated the matter, and arrived at the conclusion that appellants had an interest in the property.

An agreement was soon after entered into between appellants and appellee, by which appellee was to institute all necessary proceedings to ascertain and fix the rights of appellants; that he should pay all necessary expenses, and receive one-half of whatever should be realized. Appellants agreed that they would do no act to interfere with the proceedings. It is claimed that, with the consent of the parties, appellee agreed with Dunne he should assist in prosecuting the claims, for which he was to receive one-half of appellee's moiety, being one-fourth of what should be recovered.

Soon after, proceedings were commenced in the circuit, the superior and the county courts by these attorneys. During the continuance of these proceedings, it is claimed that about \$10,000 was realized by appellants executing the releases, by way of compromise, with several defendants to the various suits, and it is claimed that these proceeds were divided according to the terms of the agreement.

About the month of May, 1871, appellants, it is claimed, without the consent of appellee or of Dunne, terminated the several proceedings and conveyed the lands in litigation, in consideration of \$7,500 actually paid to them, and to recover one-half of that sum this action was brought. A trial by the court and a jury was had, resulting in a

verdict of \$1,500 in favor of plaintiff, on which a judgment was rendered, and this appeal prosecuted.

A number of errors are assigned on the record, but in the view we take of the case, we shall only consider whether the judgment is against the law. The court was asked to instruct the jury that the agreement entered into was champertous and void, but the court below refused to give the instruction. Blackstone defines champerty (volume 4, p. 135) as "species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant campum partire, to divide the land or other matter sued for between them, if they prevail at law, whereupon the champerter is to carry on the party's suit at his own expense." The same author informs us that the punishment, if a common person, for champerty, was by fine and imprisonment; and this was a misdemeanor, punishable at the common law. See 1 Hawk. P. C. p. 463. It was also prohibited by various ancient statutes, commencing as early as the Statute of Westm. I. c. 25, all of which enact heavy penalties for their violation.

It thus appears, that champerty was an offense at the common law, and our general assembly having adopted the common law of England as the rule of decision, so far as applicable to our condition, until modified or repealed this must be regarded as in force in this state, as affecting all such contracts, and as being opposed to sound public policy. It is certainly applicable to our condition so far as it relates to attorney and client, and contracts with intermeddlers and speculators in apparently defective titles to property. If allowed to be practiced by attorneys, it would give them an immense advantage over a client. The superior knowledge of the attorney of the rights of the client would give him the means of oppression and acquiring great and dishonest advantages over the ignorant and unsuspecting owner of property. By giving false advice, the attorney, owing to the confidence his client reposes in him, and to his superior knowledge, would have the client completely at his mercy, and would thus be enabled to acquire the client's property in the most dishonorable manner. To allow champerty would be to permit temptation to the avaricious and unscrupulous in the profession, that would, from the very nature of things, lead to great abuse and oppression.

Whilst the great body of the profession are honest, and understand and act on the duties devolving upon them, there necessarily must be, in this as in all ages of the past, some who gain admission that have neither the integrity nor sense of duty necessary to restrain them from dishonorable means in practice. Usually a person will not employ an attorney unless he feels assured of his honesty as a man as well as his ability as an attorney. Having this confidence, all must see at a glance that it would give the attorney immense power over the client, and with this power all must see that to permit him to make champertous contracts would be to place the client in the power of the attorney. Professional duty requires that advice given should be honest,

fair and unreserved; but where the weak in morals or the vicious are consulted, and they see and determine to embrace the opportunity to make a champertous contract, how can we expect them to give fair, honest and unreserved advice at the commencement, or in conducting the litigation? The just, the good and upright require no restraints, but the vicious or immoral should be freed from temptation.

At all times, in the past, champerty has been found a source of oppression and wrong to the property owner, and a great annoyance to the community. To allow it to attorneys, with a portion, but it is believed the number would be small, there would be strong temptation to annoy others by the commencement of suits without just claim or right, merely to extort money from the defendant in buying his peace. Such practices have been denominated as a crime *malum in se*. And such extortion from others, or by the oppression of a client, is unquestionably a great moral delinquency, that no government regardless of the rights of its citizens should ever tolerate. We see that it is as liable now to abuse as it ever was, and would be as injurious to our community as to other communities in the past. And this court has repeatedly held that common law misdemeanors may be punished in this state, unless abrogated by statutory enactment.

Then, has this common law offense been repealed? We think not. The general assembly has defined the offenses of barratry and maintenance, but the offense of champerty is not named; and as, at common law, all three of these offenses were regarded as separate and distinct, and as the British parliament enacted separate laws in reference to each, and as they were enforced by distinct proceedings, we may regard them as different offenses, although champerty is said to be a species of maintenance. Then, if the 108th section of the Criminal Code would not embrace this offense, it is in force as a common law misdemeanor, and we do not see that it does.

But, it is said that the case of *Newkirk v. Cone*, 18 Ill. 449, has determined that there is no law in this state against champerty, but this is manifestly a mistake. In that case there seems, at first, to have been a champertous agreement, but it was abandoned by the parties by mutual consent. Cone then went on and rendered services, and sued for professional services in prosecuting and defending causes, also for examining records in public offices, abstracting title to lands, drawing, copying and engrossing conveyances, deeds and writings, for journeys and purchasing lands, and for work and labor. Thus, it will be seen, that, although it may have been argued, the question of maintenance or champerty was not before the court, but simply whether an attorney may recover a fair compensation for professional services and labor performed as an agent, and it was held that a contract of hiring, for the purpose of investigating title, and making purchases, and rendering legal services in settling titles to land thus purchased, was legal, and the person employed could recover for such services. It is true that the court refer to the ancient common law and British

statutes to show that the contract of the parties then before the court was not affected by them. It was also shown that our statute against maintenance did not embrace that contract. There, a person desiring to purchase lands employed an attorney to examine title, to give him an opinion as to its validity, and when purchased to litigate against conflicting titles, which was held not to be maintenance. That case is essentially different from this, both in its facts and on principle, and for these reasons it cannot be regarded as an authority in favor of appellee in this case.

This court has held in *Gilbert v. Holmes*, 64 Ill. 548, and *Walsh v. Shumway*, 65 Ill. 471, that similar contracts were tainted with champerty, and could not be enforced.

According to the doctrine of the case of *Scobey v. Ross*, 13 Ind. 117, there can be no question that this contract is champertous, according to the doctrine of the courts of this country. That case refers to and reviews a large number of American decisions on this question, and carries the doctrine to the full extent of the English rule.

It was the policy of the common law to protect persons from harassing and vexatious litigation. Hence, it would not permit a person having no interest in the subject matter of the litigation to intermeddle or to become interested in the suit of another, unless it was an attorney, who could only have and demand a fee for his services, and that not in a portion of the thing in dispute. In the absence of such a rule, great wrong would necessarily be inflicted on community.

On a consideration of all the authorities, we are clearly of opinion that this contract, however honestly entered into and carried out, was void, and that the judgment of the court below should be reversed, and the cause remanded. Judgment reversed.

5. AGREEMENTS OF IMMORAL TENDENCY

EDMONDS v. HUGHES.

(Court of Appeals of Kentucky, 1903. 115 Ky. 561, 74 S. W. 283.)

Action by Flora Edmonds against A. T. Hughes. From a judgment for defendant, plaintiff appeals.

BARKER, J.¹ The appellee, Flora Edmonds, instituted this action in the Todd circuit court to recover damages of the appellee for a breach of his contract to marry her. The facts stated in the petition constitute a valid cause of action. Appellee, in his answer, admits his

¹ A portion of the opinion is omitted.

promise to marry appellant as alleged in the petition, but pleads as a defense: First. That the consideration for the contract was the agreement by appellant to then and there have illicit intercourse with him, and that his promise was made upon no other consideration. * * *

In Beach on the Modern Law of Contracts, § 1553, it is said: "A contract made in consideration of future illicit sexual intercourse is void, and the woman cannot recover under such contract, although it has been performed on her part." In Parsons on Contracts, star page 66, the rule is thus stated: "But it would seem on general principles to be a good defense [to an action for breach of promise to marry] that the promise was made on condition that the plaintiff would commit fornication with the defendant; for such a promise might be void as founded upon an illegal consideration." In Baldy v. Stratton, 11 Pa. 316, the court say: "A promise to marry on condition of illicit intercourse is illegal, and a consideration that will not support a promise. A promise to marry on an illegal consideration is virtually void." In the case of Judy v. Sterrett, 52 Ill. App. 265, it was held that "a promise of marriage in consideration of illicit sexual intercourse is void." In the case of Hanks v. Naglee, 54 Cal. 52, 35 Am. Rep. 67, it is said: "Upon well-settled principles the plaintiff should not have recovered upon a contract of this character [to marry], as, being a contract for illicit cohabitation, it is tainted with immorality. * * * It was confessedly not a case in which the defendant, taking advantage of the trust and confidence which may be fairly supposed to exist between parties who have in apparent good faith made mutual promises of marriage, has abused the confidence of the female, and induced her to yield him favors which she might have otherwise withheld. The agreement to yield her person to him was one appearing to have been deliberately made in advance, and when there had been no promise of marriage." * * *

We conclude, then, from these authorities, that each of the three defenses set up by the appellee in his answer, if true, constituted a valid bar to the cause of action contained in the petition. These principles of law were all fairly presented to the jury in the instructions, which, after a careful examination, we think were as liberal to the appellant's interest as she was entitled, and that the evidence justified the verdict rendered by the jury. Wherefore the judgment is affirmed.

6. AGREEMENTS TENDING TO FRAUD AND BREACH OF TRUST

LEVY v. SPENCER.

(Supreme Court of Colorado. 1893. 18 Colo. 532, 33 Pac. 415, 36 Am. St. Rep. 303.)

Action by Benjamin D. Spencer against Archibald T. Levy to recover part of the commissions received by defendant for the sale of certain real estate. From a judgment for plaintiff, defendant appeals. Reversed.

The other facts fully appear in the following statement by GODDARD, J.:

This action was instituted by the appellee in the district court of Arapahoe county to recover from the appellant a part of a commission received by him on account of a certain real-estate transaction. On the 14th day of March, 1890, the plaintiff filed an amended complaint, which, in substance is as follows: "That both plaintiff and defendant herein are real-estate agents, residing and doing business in the city of Denver, and the state of Colorado, and were so residing and doing business in said city at the times herein mentioned. That on the _____ day of _____, A. D. 1889, at Denver, Colorado, the said defendant, as a real-estate agent, as aforesaid, had in his hands for sale an undivided one-half interest in lots seven to sixteen, (7-16,) inclusive, block one hundred and forty-one, (141,) East Denver, said property being located at the corner of Seventeenth and Stout streets, city of Denver, and better known as the 'Albany Hotel Property,' said undivided interest being the property of one Charles H. Nix, the said one-half interest to be sold by said defendant for two hundred and fifty thousand dollars, (\$250,000.) That as commission for the sale of said one-half interest, as plaintiff is informed and believes, and so charges, was then to be paid to said defendant the sum of ten thousand dollars, (\$10,000.) That at the same time and place this plaintiff did, as agent as aforesaid, have for sale a certain one-half undivided interest in certain real estate lying and being in the county of Jefferson, and state of Colorado, * * * for sale for the sum of seventy-five thousand dollars, (\$75,000,) and in the event of making the sale of said property this plaintiff was to receive the sum of three thousand seven hundred and fifty dollars (\$3,750) as commission; said last described one-half interest being the property of one A. L. Jones. That said Jones and said Nix, being desirous of trading or selling their aforesaid interests, the said plaintiff and defendant, as agents of said parties, being desirous of bringing about said sale or said trade for said property, in consideration of that fact, and for

other mutual benefits and considerations, said plaintiff and said defendant did on the ——— day of ———, 1889, agree by and with each other that each of said plaintiff and defendant were to use their best endeavors to effect a trade of the said property between the said Nix and the said Jones at the prices hereinbefore stated, and that, in the event of their effecting a trade or sale between the said parties, that in consideration of that fact and other considerations herein mentioned, that they would each pay to the other, whenever collected, one-half of the commission paid to said agents, by their respective principals. That on the ——— day of ———, A. D. 1889, plaintiff and defendant did effect a trade or sale of the properties herein mentioned between their respective principals, the said Jones and the said Nix, at the prices hereinbefore mentioned; the said Jones executing to the said Nix a trust deed upon the aforesaid Albany Hotel property of the difference between the price of his, the said Jones', property and the price of the said Nix's Albany Hotel property. That defendant has, as plaintiff is informed and believes, and so charges, collected and settled with the said Nix for the commission agreed to be paid to said defendant by said Nix, to wit, the sum of ten thousand dollars, (\$10,000.00.) That plaintiff, before the institution of this suit, has demanded of said defendant one-half of the said commission paid by the said Nix to defendant, and to which this plaintiff, under his aforesaid contract, was entitled, to wit, the sum of five thousand dollars, (\$5,000.00.) That the defendant has failed and refused, and still fails and refuses, to pay to this plaintiff any part of said sum of five thousand dollars, (\$5,000.00.) Wherefore plaintiff demands judgment against the said defendant for the sum of five thousand dollars, (\$5,000.00,) for interest, and the cost of this suit."

Defendant demurred to the amended complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained, and thereafter, on May 9, 1890, plaintiff filed the following amendment: "Plaintiff alleges that he is ready and willing and does hereby allow to defendant Levy credit on the five thousand dollars claimed by this plaintiff from said defendant, one-half of three thousand seven hundred and fifty dollars, to wit, the sum of eighteen hundred and seventy-five dollars (\$1,875.00,) being one-half the amount due to this plaintiff from his principal, A. L. Jones. Plaintiff makes this as an amendment to and as part of the amended complaint herein. Wherefore the plaintiff prays as in his amended complaint for the sum of five thousand dollars, subject to a credit thereon of the sum of eighteen hundred and seventy-five dollars; prays for his costs herein, and for all other proper relief."

A motion was interposed to strike out this amendment for the following reason, among others: "First, because the said amendment does not state any fact upon which a cause of action could arise, nor any fact which, taken in connection with the original complaint, to which it is an amendment, (or of which it is an amendment,) is suffi-

cient to constitute a cause of action;" and also a motion for judgment on the pleadings. These motions were denied.

Thereupon the defendant answered as follows: "And now comes the defendant in the above-entitled action, and for a first defense to the plaintiff's amended complaint and the so-called amendment thereto he denies each and every allegation in said amended complaint and the amendment thereto contained, and takes issue thereon. And for a second defense to said amended complaint and the amendment thereto the defendant says that it appears in and by said amended complaint and the amendment thereto that the plaintiff and defendant were agents for two separate principals, under contracts to sell the lands of said several principals for cash; and that the said agents conspired and confederated together to force, persuade, and by virtue of said conspiracy and confederation did force and persuade, their several principals to enter into an exchange of their lands, contrary to their respective contracts with their respective principals. That it further appears by said complaint that the commission sued for by the plaintiff in this cause, and the amount which he seeks to recover, is part and portion of a fund which accrued to said agents by reason of said unlawful conspiracy and combination between the plaintiff and defendant. That the agreement between the plaintiff and defendant, as set forth in said complaint and the amendment thereto, is contrary to public policy and to law, and that the plaintiff herein, being a party thereto; cannot in law recover any part or portion thereof from the defendant."

Upon motion of plaintiff the second defense was stricken out. The case coming on for trial, defendant objected to the admission of any evidence, because the complaint did not state facts sufficient to constitute a cause of action, which objection was overruled; and upon the evidence adduced the court found for the plaintiff, and assessed his damages at the sum of \$1,625, and rendered judgment accordingly. To reverse this judgment the defendant prosecutes this appeal.

GODDARD, J., (after stating the facts.) This record presents but one question that we can properly consider, and one that was fully and fairly presented in the court below by the demurrer, the answer, and the objection to the admission of any testimony under the complaint, and that is whether the complaint states a cause of action. This is to be determined by the validity or invalidity of the agreement, as therein stated, upon which appellee predicates his right to recover. In our judgment, this agreement comes clearly within that class of contracts that is inhibited by public policy, and consequently void. By its terms each agent was to share in the commissions paid by both principals. The compensation to be jointly shared was contingent upon the consummation of the trade or sale, and this would have a tendency to induce them to disregard, if not to sacrifice, the interests of their principals, if necessary to effect that result. The fact that a sale price was fixed by the principals upon their respective properties does not an-

swer this objection. Each was entitled to the benefit of the unbiased judgment of his agent as to the value to be placed upon the other's property, and to a reasonable effort on the part of such agent to obtain a reduction of the value to be allowed therefor in the exchange. Their pecuniary interest might have prevented such disinterested action on the part of these agents; and, it appearing from the allegations of the complaint that they "did effect the trade or sale of the property as between their respective principals," the transaction is as objectionable as those universally condemned, wherein one agent acts for both principals without their knowledge or consent.

This objection is not answered by the claim that the evidence as introduced shows a transaction different from that pleaded, that their principals negotiated the trade between themselves, and that in fact plaintiff and defendant acted only as middlemen in bringing Nix and Jones together. Such evidence was not inadmissible merely because variant from the allegations of the complaint, but because of the fundamental vice in the complaint itself in not stating a cause of action susceptible of proof, or one that would justify the admission of any testimony or uphold any judgment. The contention of appellee's counsel that, the transaction being completed, and money paid, the appellant cannot avail himself of the illegality of the contract to retain it, cannot be sustained. The cases relied on as upholding the doctrine that, when profits are realized through an illegal transaction, and received by one of the joint owners, they cannot be retained by him by reason of the illegality of the transactions through which they are derived, are clearly distinguishable from the case at bar. In this case appellee asserts a claim against appellant founded upon, and recoverable only through and by virtue of, an illegal agreement. It is therefore an action to enforce an illegal executory contract. The well-established rule in such case is as expressed in *Railway Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. Rep. 883. "It is quite true that a plaintiff will in no case be permitted to recover when it is necessary for him to prove his own illegal act or contract as a part of his cause of action, or when an essential element of his cause of action is his own violation of law."

Our conclusion on this question renders a notice of the other errors assigned unnecessary. The judgment, therefore, will be reversed for the reasons above given.

7. AGREEMENTS IN DEROGATION OF THE MARRIAGE RELATION

MORRISON v. ROGERS.

(Supreme Court of California 1896. 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95.)

Action by Morrison against Rogers. Judgment for defendant, and plaintiff appeals.

HARRISON, J. This action was brought to recover certain moneys, which it is alleged the defendant promised to pay to the plaintiff if she would use her influence in endeavoring to induce a certain person to marry the defendant, and should be instrumental in bringing about such marriage. It is alleged that, in consideration of said promise by the defendant, the plaintiff did endeavor to persuade said person to marry the defendant, and was instrumental in bringing said marriage about, and that the defendant has failed to keep her promise and has not paid the money agreed by her to be paid. The rule that a marriage brokerage contract is invalid, as being contrary to public policy, and that the services rendered under such contract are without legal consideration, and are incapable of forming the foundation of an action for their recovery, is so elementary that but very few cases involving the question have found their way into the reported decisions; but, whenever the question has been presented, courts have invariably declared that the action could not be maintained. Story, Eq. Jur. § 261; 2 Pars. Cont. *74; Greenh. Pub. Pol. 478; Williamson v. Gihon, 2 Schoales & L. 357; Crawford v. Russell, 62 Barb. (N. Y.) 92; Duval v. Wellman, 124 N. Y. 159, 26 N. E. 343; Johnson v. Hunt, 81 Ky. 321.

It is sought to distinguish the present case from those in which the rule has been laid down by the fact that here there was an existing agreement for marriage between the parties, and that the agreement with the defendant was only for the purpose of promoting the carrying out of that agreement. We are of the opinion, however, that this fact does not take the case out of the above rule. The same reasons by which the rule is upheld control here. The freedom of choice essential to a happy marriage, and the voluntary selection by each spouse of the person who is to be his or her companion for life, with all that is implied in the relation of marriage, are as fully prevented by the employment of a person who is governed solely by mercenary motives to induce one of the parties to an agreement for marriage to carry it into effect, if he or she has once been disposed to abandon it, as by an endeavor to bring about such an agreement between parties who do not sustain any relation to each other. The basis of the agreement with the plaintiff in the present case is alleged to be the

fact that the defendant became apprehensive that the person who had agreed to marry her would not keep his agreement, and it was for the purpose of inducing him to forego whatever purpose he had to abandon such contemplated marriage that the plaintiff rendered the services for which the action is brought. There can be no difference, in principle, between services rendered under such an employment and those rendered for the purpose of inducing one to marry another whom he did not previously know.

The court properly sustained the demurrer to the complaint, and the judgment is affirmed.

8. AGREEMENTS IN RESTRAINT OF TRADE

(A) In General

DIAMOND MATCH CO. v. ROEBER.

(Court of Appeals of New York, 1887. 106 N. Y. 473, 13 N. E. 419,
60 Am. Rep. 464.)

This action was brought by the Diamond Match Company to restrain the defendant, William Roeber, from engaging in the manufacture or sale of friction matches in violation of a covenant in a bill of sale executed by the defendant.

ANDREWS, J.⁸ Two questions are presented—First, whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the twenty-seventh day of August, 1880, that he shall and will not at any time or times within 99 years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employé of the said Swift & Courtney & Beecher Company) within any of the several states of the United States of America, or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada, and in the territory of Montana, is void as being a covenant in restraint of trade; and, second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth street, in the city of New York, belonging to the

⁸ A portion of the opinion is omitted.

defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks, and good-will of the business, for the aggregate sum (excluding a mortgage of \$5,000 on the property assumed by the company) of \$46,724.05, of which \$13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, \$28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred, August 27, 1880, by giving to the defendant the option to receive the \$28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of the purchase price, \$18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the \$28,000, the sum of \$8,000 in cash and notes, and \$20,000 in the stock of the plaintiff; the plaintiff company having prior to said payment purchased the property of the Swift & Courtney & Beecher Company, and become the assignee of the defendant's covenant.

It is admitted by the pleadings that in August, 1880, (when the covenant in question was made,) the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the states of Connecticut, Delaware, and Illinois, and of selling the matches which it manufactured "in the several states and territories of the United States, and in the District of Columbia;" and the complaint alleges and the defendant in his answer admits that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen, and that his matches were found in the hands of dealers in 10 states. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the twenty-seventh of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of \$1,500 a year. He then entered into the employment of the plaintiff, and remained with it during the year 1881, at a salary of \$2,500 a year, and from January 1, 1882, at a salary of \$3,600 a year, when, a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than \$2,500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of \$5,000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff.

The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contem-

poraneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of \$15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law, first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date, in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality was considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Contracts (volume 2, p. 748, note.) The earliest reported case, decided in the time of Henry V., was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts, and gave judgment for the plaintiffs; and before the case of *Mitchel v. Reynolds* it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstance, and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases prior to *Mitchel v. Reynolds* sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of *Mitchel v. Reynolds* was a case of partial restraint, and the contract was sustained.

It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this state are of that character, and in all of them the particular contract before the court was sustained. *Nobles v. Bates*, 7 Cow. 307; *Chappel v. Brockway*, 21 Wend. 157; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746. In *Alger v. Thacher*, 19 Pick. (Mass.) 51, 31 Am. Dec. 119, the case was one of general restraint, and the court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In *Mitchel v. Reynolds* the court, in assigning the reason for the distinction between a contract for the general restraint of trade

and one limited to a particular place, says: "for the former of these must be void, being of no benefit to either party, and only oppressive;" and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz., the mischief which may arise (1) to the party by the loss by the obligor of his livelihood and the substance of his family, and (2) to the public by depriving it of a useful member, and by enabling corporations to gain control of the trade of the kingdom.

It is quite obvious that some of these reasons are much less forcible now than when *Mitchel v. Reynolds* was decided. Steam and electricity have for the purposes of trade and commerce almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the restless activity of mankind striving to better their condition, have greatly enlarged the field of human enterprise, and created a vast number of new industries, which gives scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and to a great extent business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England. *Rousillon v. Rousillon*, 14 Ch. Div. 351. The law has for centuries permitted contracts in partial restraint of trade, when reasonable; and in *Horner v. Graves*, 7 Bing. 735, Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."

When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one, and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-

extensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case, and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. "If," said Sir George Jessell in *Printing Co. v. Sampson*, L. R. 19 Eq. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice."

It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production, and to enhance prices, are or may be unlawful, but they stand on a different footing.

We cite some of the cases showing the tendency of recent judicial opinion on the general subject: *Whittaker v. Howe*, 3 Beav. 383; *Jones v. Lees*, 1 Hurl. & N. 189; *Rousillon v. Rousillon*, *supra*;

Leather Co. v. Lorisont, L. R. 9 Eq. 345; Collins v. Locke, 4 App. Cas. 674; Steam Co. v. Winsor, 20 Wall. 64, 22 L. Ed. 315; Morse, etc., Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513. In Whittaker v. Howe, a contract made by a solicitor not to practice as a solicitor "in any part of Great Britain," was held valid. In Rousillon v. Rousillon a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. In Jones v. Lees, a covenant by the defendant, a licensee under a patent, that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them, was held valid. Bramwell, J., said: "It is objected that the restraint extends to all England, but so does the privilege." In Steam Co. v. Winsor the court enforced a covenant by the defendant made on the purchase of a steam-ship, that it should not be run or employed in the freight or passenger business upon any waters in the state of California for the period of 10 years.

In the present state of the authorities, we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed. The covenant in the present case is partial, and not general. It is practically unlimited as to time, but this under the authorities is not an objection, if the contract is otherwise good. Ward v. Byrne, 5 Mees. & W. 548; Mumford v. Gething, 7 C. B. (N. S.) 317. It is limited as to space since it excepts the state of Nevada and the territory of Montana from its operation, and therefore is a partial, and not a general, restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the state of New York constitutes a general restraint within the authorities. In Chappel v. Brockway, *supra*, Bronson, J., in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the state, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet-boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the state of New York, but excepted other states from its operation. The remark relied upon was obiter, and in reason cannot be considered a decision upon the point suggested.

We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the states are not those of trade and commerce, and business is restrained within no such limit. The country as a whole is that of

which we are citizens, and our duty and allegiance are due both to the state and nation. Nor is it true as a general rule that a business established here cannot extend beyond the state, or that it may not be successfully established outside of the state. There are trades and employments which from their nature are localized, but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of *Steam Co. v. Winsor*, supra, supports the view that a restraint is not necessarily general which embraces an entire state. In this case the defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void. * * *

(B) Sale of Secret Process

TODE et al. v. GROSS.

(Court of Appeals of New York, 1891. 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475.)

Appeal by defendant from a judgment of the general term of the supreme court in the second judicial department, affirming a judgment entered upon the decision of the court after a trial without a jury. Affirmed.

Action for breach of covenant to recover the sum of \$5,000 as stipulated damages. On the 15th of October, 1884, the defendant owned a cheese factory situate in the town of Monroe, Orange county, comprising two parcels of land, with the buildings thereon, and a quantity of fixtures, machinery, and tools connected therewith. For some time prior, with the assistance of her husband, Conrad Gross, her brother-in-law, August Gross, and her father, John Hoffman, she had been engaged in the business of manufacturing cheeses at said factory known as "Fromage de Brie," "Fromage d'Isigny," and

"Neufchatel." Such cheeses were made by a secret process known only to herself and her said agents. On the day last named, she entered into a sealed agreement with the plaintiffs, whereby she agreed to sell and transfer to them the said factory and all its belongings, together with the "good-will, custom, trade-marks, and names used in and belonging to the said business," for the sum of \$25,000, to be paid and secured March 1, 1885, when possession was to be given. Said instrument contained a covenant on her part that she would "communicate after the first day of March, 1885, or cause to be communicated, to" said plaintiffs, "by Conrad Gross, John Hoffman, and August Gross, or one or other of them, the secret of the manufacture of the cheeses known as 'Fromage de Brie,' 'Neufchatel,' and 'D'Isigny,' and the recipe therefor, and for each of them, and will instruct or cause to be instructed them, and each of them in the manufacture thereof. And that she and the said Conrad Gross, John Hoffman, and August Gross will refrain from communicating the secret recipe and instructions for the manufacture of said cheeses, or either of them, to any and all persons other than the above-named parties of the second part, [plaintiffs,] and will also, after the first day of April, 1885, refrain from engaging in the business of making, manufacturing, or vending of said cheeses, or either of them, and from the use of the trade-marks or names, or either of them, hereby agreed to be transferred in connection with said cheeses, or either of them, or with any similar product, under the penalty of five thousand dollars, which is hereby named as stipulated damages to be paid by the party of the first part, [defendant,] or her heirs, executors, administrators, or assigns, in case of a violation by the party of the first part [defendant] of this covenant, of this contract, or any part thereof, within five years from the date hereof." She further covenanted that she herself, as well as "said Conrad Gross, John Hoffman, and August Gross, during and up to and until the first day of May, 1885, shall continue and remain in said county of Orange, and from time to time, and at all reasonable times during said period, by herself, or by said Conrad Gross, John Hoffman, and August Gross, whenever so requested by the said parties of the second part, [plaintiffs,] impart to them, or either of them, the secret of making such cheeses, and each of them, and instruct them, and each of them, in the process of manufacturing the same, and each of them, as fully as she or the said Conrad Gross, John Hoffman, or August Gross, or either of them, are informed concerning the same."

Both parties appear to have duly kept and performed the agreement, except that, as the trial court found, "subsequently to the 1st day of May, 1885, Conrad Gross, the husband of defendant, went to New York city, and engaged in the business of selling 'foreign and domestic fruits, and all kinds of cheese and sausages, &c.," * * * and while so engaged * * * sold and personally delivered from his place of business to one John Wassung three boxes of cheese

marked and named 'Fromage d'Isigny,' and having substantially the same trade-marks thereon as that sold by defendant to plaintiffs, and having stamped thereon the name 'Fromage d'Isigny,' and that said cheese so sold by him to said Wassung was a similar product to that formerly manufactured by defendant." Also, that "said August Gross, the brother-in-law of defendant, subsequent to the 1st day of May, 1885, engaged in the business of retailing fancy groceries in the city of New York, and in and during the fall of 1887, and prior to the commencement of this action, kept for sale at his place of business in New York city boxes of cheese marked or stamped 'Fromage d'Isigny.'" The court further found that the cheese so sold by Conrad Gross under the name of "Fromage d'Isigny," "was never sold by plaintiffs, nor made or manufactured by them, or either of them, but that the same was a similar product."

The court found as conclusions of law that said agreement was a reasonable one, and was founded upon a good and sufficient consideration; that said sale by Conrad and said keeping for sale by August Gross was a direct violation of the covenant in question; that the restriction imposed was no more than the interests of the parties required, and that it was not in restraint of trade or against public policy. Judgment was ordered for the plaintiffs for the sum of \$5,000 as stipulated damages.

VANN, J. (after stating the facts). The business carried on by the defendant was founded on a secret process known only to herself and her agents. She had the right to continue the business, and by keeping her secret to enjoy its benefits to any practicable extent. She also had the right to sell the business, including as an essential part thereof the secret process, and, in order to place the purchasers in the same position that she occupied, to promise to divulge the secret to them alone, and to keep it from every one else. In no other way could she sell what she had, and get what it was worth. Having the right to make this promise, she also had the right to make it good to her vendees, and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other, by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; *Leslie v. Lorillard*, 110 N. Y. 519, 534, 18 N. E.

363, 1 L. R. A. 456; *Thermometer Co. v. Pool*, 51 Hun, 157, 4 N. Y. Supp. 861. The restriction under consideration, however, was not unlimited as to time.

The chief reliance of the defendant in this court, where the point seems to have been raised for the first time, is that the covenant, so far as stipulated damages are concerned, is confined to the personal acts of Mrs. Gross, and does not embrace the acts of her agents. A careful reading of the agreement, however, in the light of the circumstances surrounding the parties when it was made, shows that no such result was intended. What was the object of the covenant? It was to keep secret, at all hazards, the process upon which the success of the business depended. On no other basis could the plaintiffs safely buy, or the defendant sell, for what her property was worth. Who had the power to keep the process secret? Clearly the defendant, if any one, as she had confided it to no one except her trusted agents, who were nearly related to her by blood or marriage. But could she covenant against the acts of those over whom she had no control? She had the right to so covenant, by assuming the risk of their actions; and, unless she had done so, presumptively she could not have sold her factory for so large a sum. It was safer for her to sell with such a covenant than it was for the plaintiffs to buy without it. She could exercise some power over her own husband and her father and her husband's brother, all of whom had been associated with her in carrying on the business, and whose actions in certain other respects she assumed to control for a limited time, whereas the plaintiffs were powerless, unless they had her promise to keep the process secret at the peril of paying heavily if she did not. It is not surprising, therefore, to find that the restrictive part of the covenant applies with the same force to her agents that it does to herself; for she undertakes that neither she nor they will disclose the secret, or engage in making or selling either kind of cheese, or use the trade-marks or names connected with the business.

We do not think that a personal act of the defendant is essential to a violation of this covenant by her; for if she permits, or even does not prevent, her agents from doing the prohibited acts, the promise is broken. While it is her exclusive covenant, it relates to the action of others; and, if they do what she agreed that they would not do, it is a breach by her, although not her own act. She violated her agreement, not by selling herself, but by not preventing others from selling. This construction of the restrictive part of the covenant would hardly be open to question, were it not that in the same sentence occurs the reparative or compensatory part designed to make the plaintiffs whole if the defendant either could not or did not keep her agreement. While this provides that any violation involves the penalty of \$5,000, it adds, "which sum is hereby named as stipulated damages to be paid" by the defendant in case of a violation by her of the covenant in

question. What kind of violation is thus referred to? The defendant says a personal violation by her only, but we think, for the reasons already given, that the spirit of the agreement includes both a violation by her own act and by the act of those whom she did not prevent from selling, although she had agreed that they would not sell. As no one not a party to a contract can violate it, every act of defendant's former agents contrary to her covenant was a violation thereof by her, whether she knew of it or assented to it or not. Whenever that was done which she agreed should not be done, it was a breach of a covenant by her, even if the act was contrary to her wishes, and in spite of her efforts to prevent it. Her covenant was against a certain act by any one of four persons, including herself. Two of those persons separately did the act which she had agreed that neither of them should do, and thus there was a violation of the covenant by her, the same as if she had done the act in person.

The argument of the learned counsel for the defendant that the contract fixed a sum to be paid in case of a violation by the defendant, but not in case of a violation "by the other parties," while plausible, is unsound, for there were no "other parties" who could break the covenant. She was the sole covenantor, and unless she kept the covenant she broke it; and she did not keep it. As the actual damages for a breach of the covenant would necessarily be "wholly uncertain, and incapable of being ascertained except by conjecture," we think that the parties intended to liquidate them when they provided that the sum named should be "as stipulated damages." The use of the word "penalty" under the circumstances is not controlling. *Bagley v. Peddie*, 16 N. Y. 469, 69 Am. Dec. 713; *Dakin v. Williams*, 17 Wend. 448, affirmed 22 Wend. 201; *Wooster v. Kisch*, 26 Hun, 61.

As there is no other question that requires discussion, the judgment should be affirmed, with costs. All concur, except BROWN, J., not sitting.

9. UNLAWFUL COMBINATIONS, MONOPOLIES, TRUSTS, ETC.

STANDARD OIL CO. OF NEW JERSEY et al. v. UNITED STATES.

(Supreme Court of The United States, 1910. 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834.)

Mr. Chief Justice WHITE⁹ delivered the opinion of the court:

The Standard Oil Company of New Jersey and thirty-three other corporations, John D. Rockefeller, William Rockefeller, and five oth-

⁹ The opinion of Mr. Justice White is greatly abridged and the dissenting opinion of Mr. Justice Harlan is omitted.

er individual defendants, prosecute this appeal to reverse a decree of the court below. Such decree was entered upon a bill filed by the United States under authority of section 4 of the act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3201]), known as the anti-trust act, and had for its object the enforcement of the provisions of that act. * * *

Both as to the law and as to the facts, the opposing contentions pressed in the argument are numerous, and in all their aspects are so irreconcilable that it is difficult to reduce them to some fundamental generalization, which, by being disposed of, would decide them all. * * *

Duly appreciating the situation just stated, it is certain that only one point of concord between the parties is discernible, which is, that the controversy in every aspect is controlled by a correct conception of the meaning of the first and second sections of the anti-trust act. We shall therefore—departing from what otherwise would be the natural order of analysis—make this one point of harmony the initial basis of our examination of the contentions, relying upon the conception that by doing so some harmonious resonance may result adequate to dominate and control the discord with which the case abounds. That is to say, we shall first come to consider the meaning of the first and second sections of the anti-trust act by the text, and after discerning what by that process appears to be its true meaning, we shall proceed to consider the respective contentions of the parties concerning the act, the strength or weakness of those contentions, as well as the accuracy of the meaning of the act as deduced from the text in the light of the prior decisions of this court concerning it. When we have done this, we shall then approach the facts.

Following this course, we shall make our investigation under four separate headings: First. The text of the first and second sections of the act, originally considered, and its meaning in the light of the common law and the law of this country at the time of its adoption. Second. The contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon which they rely. Third. The application of the statute to facts; and, Fourth. The remedy, if any, to be afforded as the result of such application.

First. The text of the act and its meaning.

We quote the text of the first and second sections of the act, as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, c. 647 (U. S. Comp. St. 1901, p. 3200).

The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (*United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 318, 17 Sup. Ct. 548, 41 L. Ed. 1019, and cases cited), that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted.

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor, then first, to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the law of this country, but by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the anti-trust act. * * *

Generalizing these considerations, the situation is this: 1. That by the common law, monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessities of life, the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would

result from monopoly,—that is, an undue enhancement of price. 3. That to protect the freedom of contract of the individual, not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly, and the same considerations caused monopoly, because of its operation and effect, to be brought within and spoken of generally as impeding the due course of, or being in restraint of, trade.

From the development of more accurate economic conceptions and the changes in conditions of society, it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statutes of 12 George III, chap. 71, enacted in 1772, and statute of 7 and 8 Victoria, chap. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of, and not in restraint of, trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business, and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting, and to exercise every reasonable right incident thereto, became the rule in the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in *Mogul S. S. Co. v. Mc-*

Gregor, [1891] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. While it is true that the decision of the House of Lords in the case in question was announced shortly after the passage of the anti-trust act, it serves reflexly to show the exact state of the law in England at the time the anti-trust statute was enacted.

In this country also the acts from which it was deemed there resulted a part, if not all, of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. The statement just made is illustrated by an early statute of the province of Massachusetts, that is, chapter 31 of the Laws of 1778-1779, by which monopoly and forestalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. To refer to the constitutional or legislative provisions on the subject, or the many judicial decisions which illustrate it, would unnecessarily prolong this opinion. We append in the margin a note to treaties, etc., wherein are contained references to constitutional and statutory provisions and to numerous decisions, etc., relating to the subject.

It will be found that, as modern conditions arose, the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing

which it was thought justified the inference of intent to do the wrong which it had been the purpose to prevent from the beginning. The evolution is clearly pointed out in *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689, and *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865, and, indeed, will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering.

Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending, as it did, upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.

As to the first section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce: * * * is hereby declared to be illegal." As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is, What was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating ef-

fect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,—that is, an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations. * * *" By reference to the terms of sec-

tion 8 it is certain that the word "person" clearly implies a corporation as well as an individual.

The commerce referred to by the words "in part," construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize," as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the 1st section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve.

And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute, by the comprehensiveness of the enumerations embodied in both the first and second sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the

essence of freedom from undue restraint on the right to contract. * * *

We come, then, to the third proposition requiring consideration, viz.:

Third. The facts and the application of the statute to them.

Beyond dispute the proofs establish substantially as alleged in the bill the following facts:

1. The creation of the Standard Oil Company of Ohio.

2. The organization of the Standard Oil Trust of 1882, and also a previous one of 1879, not referred to in the bill, and the proceedings in the supreme court of Ohio, culminating in a decree based upon the finding that the company was unlawfully a party to that trust; the transfer by the trustees of stocks in certain of the companies; the contempt proceedings; and, finally, the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations in exchange for its certificates.

The vast amount of property and the possibilities of far-reaching control which resulted from the facts last stated are shown by the statement which we have previously annexed concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust, and which came therefore to be held by the New Jersey corporation. But these statements do not with accuracy convey an appreciation of the situation as it existed at the time of the entry of the decree below, since, during the more than ten years which elapsed between the acquiring by the New Jersey corporation of the stock and other property which was formerly held by the trustees under the trust agreement, the situation, of course, had somewhat changed,—a change which, when analyzed in the light of the proof, we think establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence; that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products. The ultimate situation referred to will be made manifest by an examination of sections 2 and 4 of the decree below, which are excerpted in the margin.

Giving to the facts just stated the weight which it was deemed they were entitled to, in the light afforded by the proof of other cognate facts and circumstances, the court below held that the acts and dealings established by the proof operated to destroy the "potentiality of competition" which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey Corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint

of trade, in violation of the first section of the act, but also to be an attempt to monopolize and monopolization bringing about a perennial violation of the second section.

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect; that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have construed it upon the inferences deducible from the facts, for the following reasons:

a. Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

b. Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization, resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation, as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory

that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view. And, considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the supreme court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the methods first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated, and which, among other things, impelled the expansion of the New Jersey corporation.

The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination, and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other; and if the inferences which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

We are thus brought to the last subject which we are called upon to consider, viz.:

Fourth. The remedy to be administered.

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself is not only

a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: (1) To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. (2) The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce, is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.

Let us, then, as a means of accurately determining what relief we are to afford, first come to consider what relief was afforded by the court below, in order to fix how far it is necessary to take from or add to that relief, to the end that the prohibitions of the statute may have complete and operative force. * * *

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the first section and an attempt to create a monopoly or to monopolize under the second section, and commanded the dissolution of the combination, the decree was clearly appropriate. And this also is true of section 5 of the decree, which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect to further ownership in the New Jersey corporation of the stocks which were ordered to be retransferred. * * *

Our conclusion is that the decree below was right and should be affirmed, except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance, with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree. And it is so ordered.

Mr. Justice HARLAN concurred in part and dissented in part.

10. EXEMPTING FROM LIABILITY FOR NEGLIGENCE

JAMES QUIRK MILLING CO. v. MINNEAPOLIS & ST. L.
R. CO.

(Supreme Court of Minnesota, 1906. 98 Minn. 22, 107 N. W. 742,
116 Am. St. Rep. 336.)

Action by the James Quirk Milling Company against the Minneapolis & St. Louis Railroad Company. From an order sustaining a demurrer to the complaint, plaintiff appeals.

ELLIOTT, J. The appellant under a contract with the railway company erected a grain elevator upon its right of way. The building was destroyed by fire negligently scattered by the company's locomotives. The action was brought to recover the resulting damages, and the trial court sustained a demurrer to the complaint. The appeal is from this order.

The elevator was constructed under a contract between the parties which contained the following provision: "In consideration of the rights hereby acquired the second party agrees * * * to protect, save harmless, and indemnify the railway company, its successors and assigns, from liability to any person, corporation, or company, for or on account of any loss or damage by fire communicated by or escaping from any locomotive, engine, or car, or resulting in any manner from the construction or operation of said track."

The appellant contends that this contract is against public policy and therefore void. This involves the denial of the right of the parties to enter into such agreement. Public policy requires that the right to contract shall be preserved inviolate in ordinary cases. It is denied only when the particular contract violates some principle which is of even more importance to the general public.

As said by Sir George Jessel, M. R., in *Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 462, 465, 44 L. J. Ch. 705: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against the public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice. Therefore you have this paramount public policy to consider, that you are not likely to interfere with the freedom of contract."

In *Baltimore, etc., Ry. Co. v. Voigt*, 176 U. S. 505, 20 Sup. Ct. 387, 44 L. Ed. 560, the court said: "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen,

and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare."

It follows that the party who asserts that a particular contract is against public policy has the burden of proving the same. *Printing, etc., Co. v. Sampson*, supra; *Rousillion v. Rousillion*, 14 Ch. Div. 351; *U. S. v. Trans-Missouri, etc., Co.*, 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73; *Hartford Fire Ins. Co. v. Chicago Railway, etc., Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Stewart v. Transportation Co.*, 17 Minn. 372 (Gil. 348).

The appellant assumes that there is a general rule of law which forbids a party to protect himself by contract against damages resulting from his own negligence. But this is true only when the contract protects him against the consequences of a breach of some duty which is imposed by law. Generally a person may waive the right of action which he has against another for an injury received from the negligence of the latter, provided the contract of waiver is supported by a consideration deemed valuable by law and procured without mistake or fraud, such as would avoid other contracts. *Thompson, Negligence*, vol. 1, § 182.

In *Hartford Ins. Co. v. Chicago, etc., Ry. Co.*, 175 U. S. 91, 98, 20 Sup. Ct. 33, 36, 44 L. Ed. 84, Mr. Justice Gray, after stating the rule applicable to public carriers, said: "The plaintiff further insisted that the same rules apply universally and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct. But the only authority cited which supports this proposition is a general statement in *Cooley on Torts*, 387, and an obiter dictum in *Johnson's Adm'x v. Richmond, etc., Ry. Co.*, 86 Va. 975-978, 11 S. E. 829, and it is certainly too sweeping. Even a common carrier may obtain insurance against losses occasioned by the negligence of himself or his servants, or may by stipulation with the owner of the goods carried have the benefit of such insurance procured thereon by such owner." *Mpls., etc., Ry. Co. v. Insurance Co.*, 64 Minn. 61, 69, 66 N. W. 132; *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S. 312, 6 Sup. Ct. 1176, 29 L. Ed. 873; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730; *Wager v. Providence Ins. Co.*, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013.

The right to insure against loss by fire occasioned by the negligence of the insured is no longer questioned. *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 438, 9 Sup. Ct. 469, 32 L. Ed. 788; *Kerr*, Ins. p. 375. A stronger illustration is found in the recognized business of insuring employers of labor against damages resulting from personal injuries occasioned by the negligence of the insured.

Exceptions to the general rule which protects the freedom of contract are made in some instances, especially such as involve the relation of master and servant and the transactions of railway companies when acting as public carriers of persons and property. Positive and peremptory duties are imposed upon public carriers. Public policy requires that contracts which relieve from these absolute duties shall be held null and void. The law imposes upon a railway company the absolute duty to operate its railways, to employ suitable men to operate them, and to exercise ordinary care to furnish them a reasonably safe place to work and with reasonably safe machinery and appliances with which to perform their work. The obligation is imposed by law, and does not arise out of contract. Any breach of this duty, therefore, is a violation of the law which imposes the duty.

It follows that a contract which exempts the carrier from damages resulting from negligence in the discharge of these duties is void, because it relieves it of an absolute duty which the law imposes upon it, and because it unreasonably endangers the lives of employes and passengers. The parties to such contracts do not stand upon an equal footing. The law imposes upon the company the absolute duty to accept passengers and freight when offered, and to carry the former with the utmost and the latter with ordinary care. The traveler is often obliged to travel and the shipper to send his goods by railway. A person cannot stop to settle the terms and to negotiate a contract every time he desires to use a railway. On the other hand, a railroad, with its trained employes and monopoly of transportation facilities, has the power to exact any contract it desires. This inequality in the situation of the parties would, if permitted, enable the company to obtain unfair contracts, and the fact that a contract which exempts the company from liability for negligence relieves it from an absolute duty imposed by law and increases the danger to the lives and property of the people constitutes the reason for the rule that such contracts are against public policy. *Hartford Fire Ins. Co. v. Chicago, etc., Ry. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

Entirely different conditions are presented by the case at bar. In making the lease in question the railway company was dealing with individuals in reference to the use of its property only remotely, if at all, connected with its business as a common carrier. No law imposed upon it the duty of leasing a portion of its right of way to the appellants. A railway holds its station grounds and right of way for the public use for which the company was incorporated, "yet it is its private property, and to be occupied by itself and by others in the manner which it may consider best fitted to promote or not to interfere with the public use. It may in its discretion permit them to be occupied by others with structures convenient for the receiving and delivering of its freights upon its railroads, so long as a free and safe passage is left for the carriage of passengers and freight."

Hartford Ins. Co. v. Chicago, etc., Ry. Co., 175 U. S. 92, 99, 20 Sup. Ct. 36, 44 L. Ed. 84; Grand Trunk Ry. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; Osgood v. Central Vermont Ry. Co., 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930.

The laws of this state authorized the condemnation of a part of the right of way of a railway company for the erection of a public warehouse and elevator. Chapter 64, p. 177, Gen. Laws 1893; Gen. St. 1894, §§ 7724-7732; Rev. Laws 1905, §§ 2106-2113. But the appellant did not resort to this procedure, which would have made its elevator a public enterprise and thus subject to public regulation. *Stewart v. N. P. Ry. Co.*, 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427. It chose rather to enter into a private contract with the railway company and to release it from liability for damages occasioned by fire which might escape from its engines. For this waiver of the right of action it must have received some benefit, which it deemed the equivalent of the right of action which it waived. The company was under no legal obligation to make the lease. It might leave the appellant to its right to proceed under the statute and accept the obligations arising out of the relation thus created. The company would not be liable for damages to property placed upon its right of way by strangers without its permission, caused by fires occasioned by its want of ordinary care. Having the right to refuse to make the contract, it might stipulate for exemption from damages caused by its negligence in setting fire to the property which the lessee placed upon the leased premises.

Placing the building upon the right of way was an inconvenience to the railway company and increased the danger of fire to its own property. In the absence of the stipulation in question, the risks and liabilities of the company would have been materially increased. As the contract in no way relieves the railway company from the discharge of any absolute duty which it owes to the public or to any citizen, it is not against public policy, and is therefore binding upon the parties. The authorities, without exception, sustain this view. *Elliott on Railroads*, vol. 3, § 1236; *Griswold v. Ill. Cent. Ry. Co.*, 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647; *Stephens v. Southern Pac. Ry. Co.*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; *King v. Southern Pac. Ry. Co.*, 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755; *Kan. City, etc., Ry. Co. v. Blaker*, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Ann. Cas. 883; *Greenwich Ins. Co. v. Louisville, etc., Ry. Co.*, 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313; *Wabash Ry. Co. v. Ordelleide*, 172 Mo. 436, 72 S. W. 684; *Hartford Fire Ins. Co. v. Chicago, etc., Ry. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, same case on appeal 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; *Baltimore, etc., Ry. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; *Osgood v. Cent. Vt. Ry. Co.*, 77 Vt. 334, 60 Atl. 137, 70 L. R. A.

930; *Richmond v. New York, etc., Ry. Co.*, 26 R. I. 225, 58 Atl. 767; *Woodward v. Ft. Worth, etc., Ry. Co.*, 35 Tex. Civ. App. 14, 79 S. W. 896; *Mann v. Pere Marquette Ry. Co.*, 135 Mich. 210, 97 N. W. 721. Cf. *Quimby v. Boston & Me. Ry. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Russell v. Pittsburg, etc., Ry. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214; *Tex. & Pac. Ry. Co. v. Watson*, 190 U. S. 287, 293, 23 Sup. Ct. 681, 47 L. Ed. 1057.

The order appealed from is affirmed.

III. Effect of Illegality ¹⁰

1. AGREEMENTS PARTLY ILLEGAL

BISHOP v. PALMER et al.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339.)

Action of contract by Robert Bishop against Elisha L. Palmer et al. The plaintiff's declaration was as follows: "And the plaintiff says that heretofore, to-wit, on March 16, 1886, the defendants made with the plaintiff the written contract of which a copy is hereto annexed; that by the terms of said contract, and for the considerations therein alleged, the defendants, among other things, promised to pay to the plaintiff the sum of \$5,000 in ten equal monthly installments, on the first day of each month, thereafter, until all were paid; that the plaintiff has done and performed all things necessary, by the terms of said contract, to entitle him to receive the sum of \$5,000, but that the defendants have not performed their said promise, and have failed and neglected to pay to the plaintiff the respective sums of \$500 due on the first days of the months of July, August, September, October, and November, as aforesaid; wherefore the plaintiff says that the defendants owe him the sum of \$2,500." The second count was for \$2,500 upon an account annexed, the cause of action being the same as in the first count. To the declaration the defendants filed a demurrer.

The contract was, in substance, as follows: "This agreement, made this sixteenth day of March, A. D. 1886, by and between Robert Bishop of Boston, party of the first part, and Elisha L. Palmer, Frank

¹⁰ For discussion of principles, see *Clark on Contracts* (2d Ed.) §§ 176, 179-181, 183, 184.

L. Palmer, Edward A. Palmer, and George S. Palmer, copartners, * * * parties of the second part, and the Massasoit Manufacturing Company, a corporation, * * * party of the third part, witnesseth, that, whereas, said party of the first part is engaged in the business of manufacturing and selling bed-quilts and comfortables, together with all his plant, machinery, and stocks, manufactured and unmanufactured, now on hand, and of wholly giving up and going out of said business for the next five years, and is also desirous of selling that part of his cotton-waste business which is done or transacted in whole or in part in the city of Fall River, * * * and with any and all of the mills doing business in said city: Now, therefore, in consideration of the premises, and of the sum of \$5,000, to be paid by the parties of the second and third parts, in the manner and times hereafter specified, the party of the first part hereby sells, assigns, transfers, and delivers unto the parties of the second part his entire business, plant, and enterprise as a manufacturer of, and dealer in bed-quilts and comfortables, together with the good-will of said business, and all and singular, the machinery, etc., used by him in said business, and constituting said manufacturer's plant, as follows, to-wit: [Then follows an itemized list of the machinery, etc., to be transferred and provisions for the delivery of the same.] And, for the consideration named, the party of the first part hereby sells, assigns, transfers, and conveys to the party of the third part all that portion of his waste business which is transacted or done in the city of Fall River * * * with any and all corporations doing business in said city; and he hereby assigns and transfers to said party of the third part all his existing contracts, whether verbal or written, with any of such corporations, or with firms or persons, and all rights thereunder, including rights of renewal, and also the good will of his said business and trade with the corporations in said city of Fall River. This clause does not have any reference to buying and selling from individuals, it being the intention of said party of the first part absolutely and completely to sell and transfer to said party of the third part his entire cotton-waste business, trade, and dealings, and the exclusive right to deal and do a cotton-waste business with, and purchase cotton waste of, any and all of said corporations, for the period of five years from the date hereof. And said party of the first part hereby, for himself, his executors, and assigns, covenants and agrees with said parties of the second and third parts, and each of them, and their executors, administrators, successors, and assigns, respectively, that, for and during the period of five years from the date hereof, he will not, either directly or indirectly, in his own name, or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing, or dealing in, bed-quilts or comfortables, or of any business of which that may form any part. And he further covenants and agrees, as aforesaid, that, for and during said period, he will not enter into the cotton-waste business in said city of Fall River with

any corporation, firm, or person located and doing business in said city; and especially that he will not, directly or indirectly, in his own name, or in the name of any other person, buy, or influence or procure other persons to buy, any cotton waste from said mills, in said city of Fall River, or belonging to or controlled by any corporation located in said city, and that he will not, either directly or indirectly, make any bid therefor, or influence any other person so to do, in connection with the waste business in said city, or the purchase of waste from such parties."

The party then further agreed not to buy, or offer to buy, any waste produced by certain specified corporations in Fall River; and the contract then provided that the payment of the consideration should be in installments payable as set forth in plaintiff's declaration.

The superior court sustained defendants' demurrer, and the plaintiff appealed to the supreme judicial court.

C. ALLEN, J. The defendants' promise which is declared on was made in consideration of the sale and delivery of the business, plant, property, and contracts of the plaintiff, and the faithful performance of the covenants and agreements contained in the written instrument signed by the parties. The parties made no apportionment or separate valuation of the different elements of the consideration. The business, plant, property, contracts, and covenants were all combined as forming one entire consideration. There is no way of ascertaining what valuation was put by the parties upon either portion of it. There is no suggestion that there was any such separate valuation, and any estimate which might now be put upon any item would not be the estimate of the parties. It is contended by the defendants that each one of the three particular covenants and agreements into which the plaintiff entered is illegal and void, as being in restraint of trade. It is sufficient for us to say that the first of them is clearly so, it being a general agreement, without any limitation of space, that, for and during the period of five years, he will not, either directly or indirectly, continue in, carry on, or engage in, the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part. Thus much is virtually conceded by the plaintiff, and so are the authorities. *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203; *Dean v. Emerson*, 102 Mass. 480; *Machine Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119; *Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Davies v. Davies*, 36 Ch. Div. 359; 2 Kent, Comm. 467, note; Metc. Cont. 232.

Two principal grounds on which such contracts are held to be void are that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly. *Alger v. Thacher*, *ubi supra*. The question then arises whether an action can be supported upon the promise of the defendants founded upon such a con-

sideration as that which has been described. As a general rule, where a promise is made for one entire consideration a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made, or means of apportionment furnished, by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails. *Robinson v. Green*, 3 Metc. 161; *Rand v. Mather*, 11 Cush. 1, 59 Am. Dec. 131; *Woodruff v. Wentworth*, 133 Mass. 309, 314; *Bliss v. Negus*, 8 Mass. 51; *Clark v. Ricker*, 14 N. H. 44; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Pickering v. Railway Co.*, L. R. 3 C. P. 250; *Harrington v. Dock Co.*, 3 Q. B. Div. 549; 2 Chit. Cont. (11th Amer. Ed.) 972; *Leake*, Cont. 779, 780; *Pol. Cont.* 321; *Metc. Cont.* 247.

It is urged that this rule does not apply to a stipulation of this character which violates no penal statute, which contains nothing *malum in se*, and which is simply a promise enforceable at law. But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is therefore deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so, it rests on the same ground as if such contracts were forbidden by positive statutes. They are forbidden by the common law, and are held to be illegal. 2 Kent, Comm. 466; Metc. Cont. 221; 2 Chit. Cont. 974; *White v. Buss*, 3 Cush. 449, 450; *Hynds v. Hays*, 25 Ind. 31, 36.

It is contended that the defendants, by being unable to enforce the stipulation in question, only lose what they knew, or were bound to know, was legally null; that they have all that they suppose they were getting, namely, a promise which might be kept, though incapable of legal enforcement; and that if they were content to accept such promise, and if there is another good and sufficient consideration, they may be held upon their promise. But this agreement cannot properly extend to a case where a part of an entire and inseparable consideration is positively vicious, however it might be where it was simply invalid, as in *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378. The law visits a contract founded on such a consideration with a positive condemnation, which it makes effectual by refusing to support it, in whole or in part, where the consideration cannot be severed. The fact that the plaintiff had not failed to perform his part of the contract, does not enable him to maintain his action. An illegal consideration may be actual, and substantial, and valuable, but it is not, in law, sufficient.

The plaintiff further suggests that, if the defendants were to sue him on this contract, they could clearly, so far as the question of legality is concerned, maintain an action upon all its parts, except, possibly, the single covenant in question. *Mallan v. May*, 11 Mees. & W. 653; *Green v. Price*, 13 Mees. & W. 695, 16 Mees. & W. 346. This may be so. If they pay to the plaintiff the whole sum called for by the

terms of the contract, it may well be that they can call on him to perform all of his agreement, except such as are unlawful. In such case, they would merely waive or forego a part of what they were to receive, and recover or enforce the rest. It does not, however, follow from this that they can be compelled to pay the sum promised by them, when a part of the consideration of such promise was illegal. They are at liberty to repudiate the contract on this ground, and, having done so, the present action founded on the contract cannot be maintained; and it is not now to be determined what other liability the defendants may be under to the plaintiff, by reason of what they may have received under the contract. Judgment affirmed.

2. OBJECT INNOCENT, BUT INTENTION UNLAWFUL

(A) Sale

GRAVES et al. v. JOHNSON.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446.)

Action by Chester H. Graves and others against Walter B. Johnson for the price of liquors sold to defendant by plaintiffs. Judgment for plaintiffs, and defendant excepts.

HOLMES, J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine against the laws of that state. These are all the material facts reported, but these findings we must assume were warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Mr. Pollock, that some of the English cases which have gone furthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. *Holman v. Johnson*, 1 Cowp. 341; *Poll. Cont.* (5th Ed.) 308. See, also, *McIntyre v. Parks*, 3 Metc. 207.

The assertion of that right, however, no doubt was in the interest of English commerce, (*Pellecat v. Angell*, 2 Crompt. M. & R. 311, 313,) and has not escaped criticism, (Story, Conf. Laws, §§ 254, 257, note; 3 Kent, Comm. 265, 266; Whart. Conf. Laws, § 484,) although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See *Hodgson v. Temple*, 5 Taunt. 181; *Brown v. Duncan*, 10 Barn. & C. 93, 95, 98; *Harris v. Runnels*, 12 How. 79, 83, 84, 13 L. Ed. 901.

Of course, it would be possible for an independent state to enforce all contracts made and to be performed within it without regard to how much they might contravene the policy of its neighbors' laws. But in fact no state pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid. Poll. Cont. (5th Ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an act on the part of the seller in furtherance of the scheme. *Waymell v. Reed*, 5 Term R. 599; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927; *Hull v. Ruggles*, 56 N. Y. 424, 429.

On the other hand, plainly it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law. He must have known the intention in fact. *Finch v. Mansfield*, 97 Mass. 89, 92; *Adams v. Coulliard*, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. *Hayes v. Hyde Park*, 153 Mass. 514-516, 27 N. E. 522, 12 L. R. A. 249.

Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale that the seller merely knows that the buyer intends to resell in violation even of the domestic law. *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Hodgson v. Temple*, 5 Taunt. 181. So of the law of another state. *McIntyre v. Parks*, 3 Metc. 207; *Sortwell v. Hughes*, 1 Curt. 244, Fed. Cas. No. 13,177; *Green v. Collins*, 3 Cliff. 494, Fed. Cas. No. 5,755; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205. *Dater v. Earl*, 3 Gray, 482, is a decision on New York law.

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way, (*Suit v. Woodhall*, 113 Mass. 391, 395; *Finch v. Mansfield*, 97 Mass. 89, 92;) and the Eng-

lish decisions have gone great lengths in the case of knowledge of intent to break the domestic law, (*Pearce v. Brooks*, L. R. 1 Exch. 213; *Taylor v. Chester*, L. R. 4 Q. B. 309, 311.)

However this may be, it is decided that when a sale of intoxicating liquor in another state has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement that it was made with a view to such a breach, it is void. *Webster v. Munger*, 8 Gray, 584; *Orcutt v. Nelson*, 1 Gray, 536, 541; *Hubbell v. Flint*, 13 Gray, 277, 279; *Adams v. Coulliard*, 102 Mass. 167, 172, 173. Even in *Green v. Collins* and *Hill v. Spear*, the decision in *Webster v. Munger* seems to be approved. See, also, *Langton v. Hughes*, 1 Maule & S. 593; *M'Kinnell v. Robinson*, 3 Mees. & W. 434, 441; *White v. Buss*, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale, on the principles explained in *Hayes v. Hyde Park*, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249, and *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468. The overt act of selling, which otherwise would be too remote from the apprehended result,—an unlawful sale by some one else,—would be connected with it, and taken out of the protection of the law by the fact that that result was actually intended.

We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine,—its tendency to produce it,—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it or disapproves of it, it may be doubtful whether the connection is sufficient. Compare *Com. v. Churchill*, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in *Webster v. Munger*, and to say that when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice that he is paid for his act. See *Com. v. Harrington*, 3 Pick. 26.

The ground of the decision in *Webster v. Munger* is that contracts like the present are void. If the contract had been valid, it would

have been enforced. *Dater v. Earl*, 3 Gray, 482. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again if the same principles are not always to be applied whether the law to be violated is that of the state of the contract or of another, (see *Tracy v. Talmage*, 14 N. Y. 162, 213, 67 Am. Dec. 132,) at least the right to contract with a view to a breach of the laws of another state of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong shared by a large part of our own citizens. *Territt v. Bartlett*, 21 Vt. 184, 188, 189.

In the opinion of a majority of the court, this case is governed by *Webster v. Munger*, and we believe that it would have been decided as we decide it if the action had been brought in Maine instead of here. *Bancher v. Mansel*, 47 Me. 58. Exceptions sustained.

(B) *Loan*

TYLER v. CARLISLE.

(Supreme Judicial Court of Maine, 1887. 79 Me. 210, 9 Atl. 356,
1 Am. St. Rep. 301.)

Assumpsit to recover money loaned. The verdict was for the defendant, and the plaintiff alleged exceptions.

PETERS, C. J. The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling at the trial was that, if the plaintiff lent the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered; but otherwise if the plaintiff had merely knowledge that the money was to be so used.

Upon authority and principle the ruling was correct. Any different doctrine would, in most instances, be impracticable and unjust. It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money, to his friend,—to the man,—and not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts. In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower,—a union of purposes. The

lender must in some manner be a confederate or participator in the borrower's act,—be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower, not intend merely to serve or accommodate the man. In support of this view many cases might be adduced. A few prominent ones will suffice. *Green v. Collins*, 3 Cliff. 494, Fed. Cas. No. 5,755; *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Peck v. Briggs*, 3 Denio (N. Y.) 107; *McIntyre v. Parks*, 3 Metc. (Mass.) 207; *Banchor v. Mansel*, 47 Me. 58. See *Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 47, 28 Am. Rep. 9.

Nor was the branch of the ruling wrong that plaintiff, even though a participator, could recover his money back if it had not been actually used for illegal purposes. In minor offenses, the locus penitentiae continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract, or the illegal purpose has not been put in operation. The lender can cease his own criminal design, and reclaim his money. "The reason is," says Wharton, "the plaintiff's claim is not to enforce, but to repudiate, an illegal contract." Whart. Cont. § 354, and cases there cited. The object of the law is to protect the public,—not the parties. "It best comports with public policy to arrest the illegal transaction before it is consummated," says the court in *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755. See *White v. Bank*, 22 Pick. (Mass.) 181. The rule allowing a recovery back does not apply where the lender knows that some infamous crime is to be committed with the means which he furnishes. It applies only where the minor offenses are involved. Exceptions overruled.

3. RELIEF OF PARTY TO UNLAWFUL AGREEMENTS

WHITE v. PRESIDENT, ETC., OF FRANKLIN BANK.

(Supreme Judicial Court of Massachusetts, 1839. 22 Pick. 181.)

By an agreed statement of facts, it appeared, that on the 10th of February, 1837, the plaintiff deposited with the defendants the sum of \$2,000, and received from them a book containing the following words and figures, to wit:

"Dr. Franklin Bank, in account with B. F. White, Cr., 1837, Feb. 10th. To cash deposited, \$2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier."

It further appeared, that on the 7th of July, 1837, the plaintiff brought this action against the bank to recover the money so deposited by him, declaring on the money counts, and on an account stated.

If the court should be of opinion, that the action could be maintained, the defendants were to be defaulted and judgment rendered for the sum of \$2,000 with interest; otherwise the plaintiff was to become nonsuit.

WILDE, J. The first ground of the defence is, that the action was prematurely commenced. The entry in the book given to the plaintiff by the cashier of the bank, is undoubtedly good evidence of a promise to pay the amount of the deposit on the 10th day of August; and if this was a valid and legal promise this action cannot be maintained. But it is very clear, that this promise or agreement that the deposit should remain in the bank for the time limited, is void by virtue of Rev. St. c. 36, § 57, which provides that no bank shall make or issue any note, bill, check, draft, acceptance, certificate or contract in any form whatever for the payment of money, at any future day certain, or with interest excepting for money that may be borrowed of the commonwealth, with other exceptions not material in the present case.

The agreement that the deposit should remain until the 10th day of August amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day. This, therefore, was an illegal contract and a direct contravention of the statute. Such a promise is void; and no court will lend its aid to enforce it. This is a well-settled principle of law. It was fully discussed and considered in the case of *Wheeler v. Russell*, 17 Mass. 281, and the late chief justice, in delivering the opinion of the court, remarked, "that no principle of law is better settled, than that no action will lie upon a contract made in violation of a statute or of a principle of the common law." The same principle is laid down in *Bank v. Merrick*, 14 Mass. 322, and in *Russell v. De Grand*, 15 Mass. 39. In *Belding v. Pitkin*, 2 Caines (N. Y.) 149, Thompson, J., said, "It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." The same principle is fully established by the English authorities. In *Shiffner v. Gordon*, 12 East, 304, Lord Ellenborough laid it down as a settled rule, "that where a contract which is illegal remains to be executed, the court will not assist either party, in an action to recover for the non-execution of it."

It is therefore very clear, we think, that no action can be maintained on the defendants' express promise, and that, if the plaintiff be entitled to recover in any form of action, it must be founded on an implied promise.

The second objection, and that on which the defendants' counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other, on an illegal contract, both being *participes criminis*, no

action can be maintained to recover it back. The rule of law is so laid down by Lord Kenyon, in *Howson v. Hancock*, 8 Term R. 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum*, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases.

The rule as stated by Comyn, in his treatise on Contracts, will reconcile most of the cases which are apparently conflicting. "When money has been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover." 2 Com. Cont. 109.

The rule, with these qualifications and distinctions, is well supported by the cases collected in Comyn and by later decisions. The question then is, whether, in conformity with these principles, upon the facts agreed, this action can be maintained.

The first ground on which the plaintiff's counsel rely in answer to the defendants' objection is, that there was no illegality in making the deposit, and that the illegality of the transaction is confined to the promise of the bank and the security given for the repayment, that alone being prohibited by the statute.

The leading case on this point is that of *Robinson v. Bland*, 2 Burrows, 1077. That was an action on a bill of exchange given for money lent and for money won at play. By St. 9 Anne, c. 14, it was enacted that all notes, bills, bonds, judgments, mortgages, or other securities for money won or lent at play should be utterly void. The court held, that the plaintiff was not entitled to recover on the bill of exchange, but that he might recover on the money counts for the money lent, although it was lent at the same time and place that the other money for which the bill was given was won.

The same principle was laid down in the cases of *Insurance Co. v. Scott*, 19 Johns. (N. Y.) 1; *Insurance Co. v. Caldwell*, 3 Wend. (N. Y.) 296, and *Insurance Co. v. Bloodgood*, 4 Wend. (N. Y.) 652. In these cases the decisions were, that although the notes were illegal and void as securities, yet that the money lent, for which the notes

were given, might be recovered back. The principle of law established by these decisions is applicable to the present case. The only doubt arises from the meaning of the word "contract," in the prohibitory statute. But taking that word in connection with the other words of prohibition, we think it equivalent to the promise of the bank, and that the intention of the legislature was to prohibit the making or issuing of any security in any form whatever, for the payment of money at any future day.

The next answer to the objection of the defendants is, that although the plaintiff may be considered as being *particeps criminis* with the defendants, they are not in *pari delicto*. It is not universally true, that a party, who pays moneys as the consideration of an illegal contract, cannot recover it back. Where the parties are not in *pari delicto*, the rule "*potior est conditio defendentis*" is not applicable. In *Lacaussade v. White*, 7 Term R. 535, the court say, "that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration it may be recovered back again by the party who has thus improperly paid it, than, by denying the remedy, to give effect to the illegal contract."

This principle, however, is not by law allowed to operate in favor of either party, where the illegality of the contract arises from any moral turpitude. In such cases the court will not undertake to ascertain the relative guilt of the parties or afford relief to either.

But where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times.

In the case of *Smith v. Bromley*, 2 Doug. 696, note, it was decided, that the plaintiff was entitled to recover in an action for money had and received, for money paid by the plaintiff to the defendant for the purpose of inducing him to sign the certificate of a bankrupt, the plaintiff's sister. Lord Mansfield laid down the doctrine on this point, which has been repeatedly confirmed. "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." And this doctrine was afterwards adhered to and confirmed by the whole court, in the case of *Jones v. Barkley*, 2 Doug. 684.

On this distinction it has ever since been held, that where usurious interest has been paid, the excess above the legal interest may be recovered back by the borrower in an action for money had and re-

ceived. So money paid to a lottery-office keeper as a premium for an illegal insurance, is recoverable back, in an action for money had and received. *Jaques v. Golightly*, 2 W. Bl. 1073. But in *Browning v. Morris*, Cowp. 790, it was decided, that where a lottery-office keeper pays money in consequence of having insured the defendant's tickets, such contract being prohibited by St. 17 Geo. III. c. 46, he cannot recover it back, though the premium of insurance paid by the insured to the lottery-office keeper might be. The distinction on which this case was decided is very material in the present case. Lord Mansfield referred to the determination in *Jaques v. Golightly*, where it was said, "that the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office keepers." And he adds, "It is very material, that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side, —upon the office keeper. The man who makes the contract is liable to no penalty. So in usury there is no penalty upon the party who is imposed upon."

The same distinction is noticed and enforced by Lord Ellenborough, in *Williams v. Hedley*, 8 East, 378. In that case it was decided, that where money was paid to a plaintiff to compromise a *qui tam* action for usury, it might be recovered back in an action for money had and received; because the prohibition and penalties of St. 18 Eliz. c. 5, attached only on "the informer or plaintiff, or other person suing out process in the penal action, making composition, etc." It was argued for the defendant in that case, "that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute it was so far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he was not therefore to be considered as strictly in *pari delicto* with the plaintiff in the *qui tam* action, he was at any rate *particeps criminis*, and in that respect not entitled to recover from his codefendant, money which he had paid him in the course and prosecution of their mutual crime." This argument was overruled, and Lord Ellenborough fully approved the doctrine laid down by Lord Mansfield in *Smith v. Bromley*, and the decisions in the several cases in which that doctrine had been confirmed.

The same distinction has been recognized in other cases, and was adopted by this court in *Worcester v. Eaton*, 11 Mass. 376, in which Parker, C. J., after referring to the above cases, said: "This distinction seems to have been ever afterwards observed in the English courts; and, being founded in sound principle, is worthy of adoption, as a principle of the common law in this country."

The principle is, in every respect, applicable to the present case, and is decisive. The prohibition is particularly levelled against the bank, and not against any person dealing with the bank. In the words

of Lord Mansfield, "the statute itself, by the distinction it makes, has marked the criminal." The plaintiff is subject to no penalty, but the defendants are liable, for the violation of the statute, to a forfeiture of their charter. To decide that this action cannot be maintained would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.

There is still another ground on which the plaintiff's counsel rely. This action proceeds in disaffirmance of an executory illegal contract, and was commenced before the money which the defendants contracted to pay was by the terms of the contract payable; the plaintiff therefore had a right to rescind the contract, or rather to treat it as a void contract, and to recover back the consideration money.

It was so decided in *Walker v. Chapman*, Lofft, 342, where money had been paid in order to procure a place in the customs, but the place had not been procured; and in an action brought by the party who paid the money, it was held that he should recover, because the contract continued executory. This case was cited with approbation by Buller, J., in *Lowry v. Bourdieu*, 2 Doug. 470; and the distinction between contracts executed and executory, he said, was a sound one. The same distinction has been recognized in actions brought to recover back money paid on illegal wagers, where both parties were in *pari delicto*.

The case of *Tappenden v. Randall*, 2 Bos. & P. 467, was decided on that distinction. Heath, J., said: "It seems to me that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of the kind occurs, I think there ought to be *locus penitentie*, and that a party should not be compelled against his will to adhere to the contract." The same distinction is recognized in several other cases. 5 Term R. 405; 1 Hl. Bl. 67; 7 Term R. 535; 3 Taunt. 277; 4 Taunt. 290.

In the case of *Aubert v. Walsh*, 3 Taunt. 277, the authorities were considered, and the law was definitely settled as above stated; and it does not appear that it has ever since been doubted. In *Insurance Co. v. Kip*, 8 Cow. (N. Y.) 20, the same principle is recognized, although the case was not expressly decided on that point. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent the execution of unlawful contracts, and can in no case work injustice to either party.

It is, however, denied by the defendant's counsel that the contract in question was executory, within the true intent and meaning of these decisions and the doctrine now laid down. This question has not been much discussed, and it is not necessary to decide it in the present case, the court being clearly of opinion that the plaintiff is entitled to recover on the other grounds mentioned. We have considered the question as to the distinction between executory and executed contracts, because it may be of some importance that the law in that respect should not be supposed to be doubtful in our opinion, which might be inferred, perhaps, if we should leave this question unnoticed.

The only remaining question is, whether the plaintiff was bound to make a demand on the bank before he commenced his action. The general rule is, that where money is due and payable, an action will lie without any previous demand. But where money is deposited in a bank in the usual course of business, we should certainly hold that a previous demand would be requisite. But if money should be obtained by a bank by fraud, or, as in the present case, by means of an illegal contract, the bank claiming to hold it under such contract, there can be no good reason given why the bank should be exempted from the operation of the general rule. In *Clark v. Moody*, 17 Mass. 145, it was held, that if a factor should render an untrue account, claiming a greater credit than he was entitled to, the principal would have a right of action without a demand.

If the defendants had sold to the plaintiff a post-note payable at a future day, it could hardly be doubted that an action would lie to recover back the consideration money, without any previous demand; and there seems to be no substantial distinction between such a case and the one in question. Judgment on default.

OPERATION OF CONTRACT

I. Limits of Contractual Relation¹

1. IMPOSING LIABILITY ON THIRD PERSONS

(A) In General

BOSTON ICE CO. v. POTTER.

(Supreme Judicial Court of Massachusetts, 1877. 123 Mass. 28,
25 Am. Rep. 9.)

Contract on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial.

At the trial in the superior court, before Wilkinson, J., without a jury, the plaintiff offered evidence tending to show the delivery of the ice and its acceptance and use by the defendant from April 1, 1874, to April 1, 1875, and that the price claimed in the declaration was the market price. It appeared that the ice was delivered and used at the defendant's residence in Boston, and the amount left daily was regulated by the orders received there from the defendant's servants; that the defendant, in 1873, was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizen's Ice Company sold its business to the plaintiff, with the privilege of supplying ice to its customers. There was some evidence tending to show that the plaintiff gave notice of this change of business to the defendant, and informed him of its intended supply of ice to him; but this was contradicted on the part of the defendant.

The judge found that the defendant received no notice from the plaintiff until after all the ice had been delivered by it, and that there was no contract of sale between the parties to this action except what was to be implied from the delivery of the ice by the plaintiff to the defendant and its use by him; and ruled that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and that the plaintiff could not maintain this action. The plaintiff alleged exceptions.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and

¹ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 188-192

upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v. Snell*, 104 Mass. 173, 177, 6 Am. Rep. 216. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Orcutt v. Nelson*, 1 Gray, 536, 542; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Hardman v. Booth*, 1 Hurl. & C. 803; *Humble v. Hunter*, 12 Q. B. Div. 310; *Robson v. Drummond*, 2 Barn. & Adol. 303. If he had received notice and continued to take the ice as delivered, a contract would be implied. *Mudge v. Oliver*, 1 Allen, 74; *Orcutt v. Nelson*, *ubi supra*; *Mitchell v. Lapage*, Holt, N. P. 253.

There are two English cases very similar to the case at bar. In *Schmaling v. Thomlinson*, 6 Taunt. 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of *Boulton v. Jones*, 2 Hurl. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject matter of this action.

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence. Exceptions overruled.

(B) Liability for Inducing Party to Break Contract

PERKINS v. PENDLETON et al.

(Supreme Judicial Court of Maine, 1897. 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252.)

Action by Webster C. Perkins against Fremont Pendleton and others. From an order overruling a demurrer to the declaration, defendants except.

WISWELL, J. To the plaintiff's declaration, which appears in full in the statement of the case, the defendants filed a general demurrer, which was overruled by the justice presiding at nisi prius, and the declaration adjudged good. The case comes to the law court upon exceptions to this ruling.

The plaintiff alleges that upon a certain day he was, and for 22 years prior to that time had been, in the employ of the Mt. Waldo Granite Company as a stone cutter, working by the piece; that he was making large profits out of his employment; that he would have continued in such employment from the day named until the date of his writ "but for the wrongful acts, inducements, threats, persuasions, and grievances committed by said defendants against the said plaintiff as hereinafter set forth;" that on the day named, and "at divers other times thereafter until the date of the plaintiff's writ," the defendants "did unlawfully and without justifiable cause, molest, obstruct, and hinder the plaintiff from carrying on his said trade, occupation, or business as a stone cutter for the said Mt. Waldo Granite Company, and wrongfully, unlawfully, and unjustly had him discharged without any justifiable cause from the employment of the said Mt. Waldo Granite Company by willfully threatening, persuading, inducing, and by other overt acts compelling, the said Mt. Waldo Granite Company, against its will, and without any desire on its part so to do, to discharge the said plaintiff from its employ for the sole reason that the plaintiff would not become a member in the order of the Mt. Waldo Branch of the Granite Cutters' National Union"; whereby he suffered the injury specially set out in his declaration.

Does this statement of facts sufficiently set out an actionable wrong upon the part of the defendants? That an action lies under certain circumstances for procuring a third person to break his contract with the plaintiff has been frequently decided by the courts of England and of this country.

In *Lumley v. Gye*, 2 El. & Bl. 216, decided in 1853, the action was for knowingly and maliciously inducing an opera singer to break her contract with the plaintiff to perform exclusively for a certain time

in his theater. The right of action was sustained by a majority of the court.

In *Bowen v. Hall*, 6 Q. B. Div. 333, decided in 1881, a person had contracted to manufacture glazed bricks for the plaintiff, and not to engage himself to any one else for a term of five years. The English court of appeals held that an action could be maintained against the defendant for maliciously procuring a breach of this contract, provided damage accrued; and that to sustain the action it was not necessary that the employer and employé should stand in the strict relation of master and servant. It was said by the court in this case: "That wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. * * * If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. * * * Merely to persuade a person to break his contract may not be wrongful in law or fact, * * * but, if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore an actionable act if injury ensued from it."

The doctrine of these cases has been very generally adopted, and the cases themselves very frequently cited, by the courts of this country. *Walker v. Cronin*, 107 Mass. 555; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Noice v. Brown*, 39 N. J. Law, 569; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Daniel v. Swearingen*, 6 S. C. 297, 24 Am. Rep. 471.

In view of these authorities and others, which it is not necessary to refer to, it must be conceded that for a person to wrongfully—that is, by the employment of unlawful or improper means—induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable; and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employé; in fact it is not confined to contracts of employment.

But in this case the plaintiff does not allege that the Mt. Waldo Granite Company was induced by the wrongful means adopted by the defendants to break a contract, nor that there was any contract between the plaintiff and the employer for any definite time. We must, therefore, assume that there was none, that either party had the right to terminate the employment at any time, and that the act of the Mt. Waldo Company in discharging the plaintiff was lawful, and one which

the company had a perfect right to do at any time. The question presented, then, is whether a person can be liable in damages for inducing and persuading, by threats or other unlawful means, an employer to discharge his employé when the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employé. The question is a novel one in this state, but it has already arisen and been passed upon by the courts of some other states.

In *Walker v. Cronin*, 107 Mass. 555, the plaintiffs alleged that the defendant did "unlawfully and without justifiable cause, molest, obstruct, and hinder the plaintiffs from carrying on" their business of manufacture and sale of boots and shoes, "with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and willfully persuaded and induced a large number of persons who were in the employment of the plaintiff," and others "who were about to enter into" their employment, "to leave and abandon the employment of the plaintiff, without their consent and against their will," and alleged that the plaintiffs lost the services of said persons and the profits and advantages they would otherwise have made, and suffered losses in their business. It will be noticed that there is no allegation here of any definite contract as to time between the plaintiffs and their employés who were induced to leave their employment, and one ground of action was that certain persons who were about to enter into their employment, but who had not commenced at the time, were induced to leave and abandon the employment of the plaintiffs. But the court held in an exhaustive opinion, which has been frequently cited by other courts in this country, and which was cited by counsel in the argument in *Bowen v. Hall*, *supra*, that the action could be maintained.

It is said in the opinion: "This [declaration] sets forth sufficiently (1) intentional and willful acts (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damages and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage and loss resulting." The court quotes the general principles as announced in *Comyns' Digest*, "Action upon the Case": "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages;" and goes on to say that "the intentional causing of such loss to another, without justifiable cause, and with a malicious purpose to inflict it, is of itself a wrong." Later in the opinion the court uses this language: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it

come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

This case was not decided upon the ground that the plaintiffs could recover for the loss of the value of actual contracts by reason of their nonfulfillment, because, so far as the case shows, there was no breach of contract, but the gravamen of the action was, as expressed by the court, "the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy."

In *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367, the court decided that, although no contract existed between the master and servant, and no legal right, as between them, was violated, still the servant may maintain an action for damages against a third person who has maliciously procured his discharge. The court, in its opinion, after quoting freely from *Walker v. Cronin*, *supra*, and after referring to numerous other authorities, says: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it; but, so long as the former is willing and ready to perform, it is not the legal right, but is a wrong, on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it."

In *Lucke v. Assembly*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421, decided in 1893, the action was to recover damages for the wrongful and malicious interference of the defendant, by means of which the plaintiff was discharged from his employment, and thereby deprived of his means of livelihood. The defendant, a labor organization, gave notice to the plaintiff's employers that in case the plaintiff, a nonunion man, was longer retained, it would be compelled to notify all labor organizations of the city that their house was a nonunion house. The work of the plaintiff was entirely satisfactory to his employers, who intended to retain him permanently, but who, in their contract, reserved the right to discharge him at the end of any week. The court decided that the action could be maintained, and damages recovered from the defendant for maliciously and wantonly procuring his discharge. In that case the declaration alleged the procurement of a breach of contract by the wrongful acts of the defendant.

The court held that the evidence did not sustain the declaration, but allowed an amendment, saying: "If there was no agreement for any particular period of time, but the employment was one in which the agreement was that plaintiff should be given employment as long as he performed his work satisfactorily, and he has been discharged from it solely through the malicious and wrongful procurement of the defendant, and injury has resulted, he should have laid his case accordingly." We also quote from the same opinion, the following: "The appellant, by the action of the appellee, lost his place in the month of February, and, although persistently in quest of a position, he did not succeed in obtaining work until the following April, when he secured employment with a merchant tailor at five dollars less per week than he was receiving when he was discharged. It would be strange, indeed, if the law, under such a state of facts as this record exhibits, provided no remedy." In this latter case *Chipley v. Atkinson*, *supra*, is quoted, and expressly approved.

In *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882 decided in 1896, it was held that one who procures the discharge of an employé, not engaged for any definite time, by threatening to terminate a contract between himself and the employer, which he had a right to terminate at any time, is not subject to an action by the employé for damages, whatever may have been his motive in procuring the discharge. But the doctrine of the later cases cited in this opinion was expressly recognized and approved by the court in this language: "The authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act or threat aliunde the exercise of a lawful right, had broken up the contract relation between the plaintiff and *Liversont*, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor."

In *Harvester Co. v. Meinhardt*, 24 Hun (N. Y.) 489, the court said: "A distinction has been sought to be made between the cases where there has been an unexpired time contract and cases where the services were by the day, or by the piece, but I do not think such distinction rests upon any sound reason. * * * In such case the injury to the property and business of the employer would not consist so much in breaking the contract which existed as in the loss of profits derived from the work of the laborer if he continued in the employment; and the probability or certainty of such loss would be, in each case, a question of fact."

The same principle has been applied to the procurement, by wrongful means, of the breach of contracts of sale. For instance, in the case of *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Déc. 623, the plaintiff had made an oral contract for the sale of chattels. The contract was not enforceable, because within the statute of frauds.

The defendant fraudulently represented that the plaintiff did not intend to carry out the contract, and deliver the chattels, and thereby procured a breach of the contract by the other party to it. It was said by the court: "It is not material whether the contract of the plaintiff with Seagraves & Wilson was binding on them or not. The evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendant."

And in *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30, one S. had contracted by parol to sell and deliver to the plaintiff a quantity of cheese, but, being made to believe, by the fraud of the defendant, that the plaintiff did not want the cheese, sold it to the defendant. The contract was not binding because within the statute of frauds, but it would have been performed by S. had it not been for the fraud of the defendant. The court held that an action was maintainable against the defendant therefor.

Our conclusion is that wherever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment, which, but for such wrongful interference, would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employé whom he would otherwise have retained.

The case of *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, in no way conflicts with this result. There the court simply decided that the defendant was not liable for doing what he had a perfect and absolute right to do, even if in doing this he was actuated by a malicious motive against the plaintiff. Many cases were cited to the effect that "malicious motives make a bad act worse, but they cannot make that wrong which in its own essence is lawful."

We think that the important question in an action of this kind is as to the nature of the defendant's act, and the means adopted by him to accomplish his purpose. Merely to induce another to leave an employment, or to discharge an employé, by persuasion or argument, however whimsical, unreasonable, or absurd, is not, in and of itself, unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employé whom he desired to retain, and would have retained, except for such unlawful threats, is an actionable wrong. Nor do we differ from the recent decision of the Vermont court in the case above referred to, which holds that a threat to do what the defendant had a right to do would not be such a one as to make a defendant liable in an action of this kind.

It is the opinion of the court that the plaintiff's declaration fairly sets out a cause of action in accordance with these principles; that the question is one of proof, rather than of pleading; and that, if the plaintiff can prove the essential allegations contained in his declaration, he is entitled to recover. Exceptions overruled.

2. CONFERRING RIGHTS ON THIRD PERSONS

(A) *Massachusetts Doctrine*

BORDEN et al. v. BOARDMAN.

(Supreme Judicial Court of Massachusetts, 1892. 157 Mass. 410,
32 N. E. 469.)

Action by Clara H. Borden and others against John W. Boardman to enforce an agreement between a third party and the defendant in favor of the plaintiffs. Case reported to the supreme judicial court.

MORTON, J. The evidence offered in bar was rightly excluded. The subsequent failure of Collins to perform his contract would not release the defendant from the obligation, if any, which he had assumed to the plaintiff, in the absence of any agreement, express or implied, that the money was to be paid to the plaintiff only in case Collins fulfilled his contract. *Cook v. Wolfendale*, 105 Mass. 401. There was no evidence of such an agreement.

The other question is more difficult. The case does not present a question of novation, for there was no agreement between the plaintiff Collins and the defendant that the latter should pay to the plaintiffs, out of the money in his hands, and due to Collins, a specific sum, and that thenceforward the defendant should be released from all liability for it to Collins, and should be liable for it to the plaintiffs. There was no agreement between the plaintiffs and the defendant that the latter would pay the money to them. The conversation between one of the plaintiffs and the defendant cannot be construed as affording evidence of such an agreement. At the same instant that the defendant admitted that he was holding money for the plaintiffs, he repudiated any liability to the plaintiffs for it. Neither can it be claimed that there was an equitable assignment of the amount in suit from Collins to the plaintiffs. There was no order or transfer given by him to them, nor was any notice of the arrangement between him and the defendant given by him to the plaintiffs. *Lazarus v. Swan*, 147 Mass. 330, 17 N. E. 655.

The case upon this branch, therefore, reduced to its simplest form,

is one of an agreement between two parties—upon sufficient consideration, it may be, between them—that one will pay out of funds in his hands, belonging to the other, a specific sum to a third person, who is not a party to the agreement, and from whom no consideration moves. It is well settled in this state that no action lies in such a case in favor of such third party to recover the money so held of the party holding it. *Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1, and cases cited; *Rogers v. Stone Co.*, 130 Mass. 581, 39 Am. Rep. 478; *New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381, 21 N. E. 947; *Marston v. Bigelow*, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; *Saunders v. Saunders*, 154 Mass. 337, 28 N. E. 270. Certain exceptions which were supposed to exist have either been shown not to exist, or have been confined within narrower limits. *Bank v. Rice*, *supra*; *Marston v. Bigelow*, *supra*.

We have assumed that the sum which the defendant agreed with Collins to pay the plaintiffs was specific. But it is to be observed that the agreement between the plaintiffs and Collins was that it should not cost more than \$150 to put the building back. Collins told the defendant that there was \$150 due to the plaintiffs. The defendant reserved \$200. It may well be doubted, therefore, whether the defendant had in his hands a specific sum to be paid to the plaintiffs, or whether he agreed with Collins to hold and pay the plaintiffs a specific sum. If the sum was not specific the plaintiffs do not claim, as we understand them, that they can recover. Judgment for the defendant.

(B) New York Doctrine

LAWRENCE v. FOX.

(Court of Appeals of New York, 1859. 20 N. Y. 268.)

H. GRAY, J.² The first objection raised on the trial amounts to this: That the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay and, therefore, not competent. Had the plaintiff sued Holly for this sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterward sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an

² The statement of facts and dissenting opinion of Comstock, J., are omitted.

objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury.

But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the supreme court of this state—in an able and painstaking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analyzed—that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the court for the correction of errors. *Farley v. Cleaveland*, 4 Cow. 432, 15 Am. Dec. 387; s. c. in error, 9 Cow. 639. In that case one Moon owed Farley and sold to Cleaveland a quantity of hay, in consideration of which Cleaveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleaveland from Moon was a valid consideration for Cleaveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise although made for the benefit of the plaintiff could not inure to his benefit. The hay which Cleaveland delivered to Moon was not to be paid to Farley, but the debt incurred by Cleaveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid.

That case has been often referred to by the courts of this state, and has never been doubted as sound authority for the principle upheld by it. *Barker v. Bucklin*, 2 Denio, 45, 43 Am. Dec. 726; *Canal Co. v. Westchester County Bank*, 4 Denio, 97. It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon but to the plaintiff Farley. In this case the promise was made to Holly and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant. As early as 1806 it was announced by the supreme court of this state, upon what was then regarded as the settled law of England, "That where one person makes a promise to another for the benefit of a third person, that third person may main-

tain an action upon it." *Schermerhorn v. Vanderheyden*, 1 Johns. 140, 3 Am. Dec. 304, has often been reasserted by our courts and never departed from.

The case of *Seaman v. White* has occasionally been referred to (but not by the courts) not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in *Schermerhorn v. Vanderheyden*. In that case one Hill, on the 17th of August, 1835, made his note and procured it to be indorsed by Seaman and discounted by the Phoenix Bank. Before the note matured and while it was owned by the Phoenix Bank, Hill placed in the hands of the defendant, Whitney, his draft accepted by a third party, which the defendant indorsed, and on the 7th of October, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover: first, for the reason that no promise had been made by Whitney to pay, and second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note, had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phoenix Bank who then owned the note; although in the course of the opinion of the court, it was stated that, in all cases the principle of which was sought to be applied to that case, the fund had been appropriated by an express undertaking of the defendant with the creditor. But before concluding the opinion of the court in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor.

This question was subsequently, and in a case quite recent, again the subject of consideration by the supreme court, when it was held, that in declaring upon a promise, made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor, a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of *Schermerhorn v. Vanderheyden*, with many intermediate cases in our courts, were cited, in which the doctrine of that case was not only approved but affirmed. *Canal Co. v. Westchester County Bank*, 4 Denio, 97.

The same principle is adjudged in several cases in Massachusetts I will refer to but few of them. *Arnold v. Lyman*, 17 Mass. 400, 9 Am. Dec. 154; *Hall v. Marston*, 17 Mass. 575; *Brewer v. Dyer*, 7 Cush. (Mass.) 337, 340. In *Hall v. Marston* the court say: "It seems

to have been well settled that if A. promises B. for a valuable consideration to pay C., the latter may maintain assumpsit for the money;" and in *Brewer v. Dyer*, the recovery was upheld, as the court said, "upon the principle of law long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded."

There is a more recent case decided by the same court, to which the defendant has referred and claims that it at least impairs the force of the former cases as authority. It is the case of *Mellen v. Whipple*, 1 Gray (Mass.) 317. In that case one Rollins made his note for \$500, payable to Ellis and Mayo, or order, and to secure its payment mortgaged to the payees a certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant, by deed in which it was stated that the "granted premises were subject to a mortgage for \$500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel." The deed thus made was accepted by Whipple, the mortgage was afterward duly assigned, and the note indorsed by Ellis and Mayo to the plaintiff's intestate. After Whipple received the deed he paid to the mortgagees and their assigns the interest upon the mortgage and note for a time, and upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note. The court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of redemption did not lessen the plaintiff's security, and that as nothing had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins, there was no consideration to support an express promise, much less an implied one, that Whipple should pay Mellen the amount of the note. That is all that was decided in that case, and the substance of the reasons assigned for the decision; and whether the case was rightly disposed of or not it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering.

But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of *Felton v. Dickinson*, 10 Mass. 287, and others that might be cited are of that class; but concede them all to

have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the cestui que trust, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both.

The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases. It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and, therefore, the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (*Berly v. Taylor*, 5 Hill, 577-584 et seq.), until his dissent was shown?

The cases cited and especially that of *Farley v. Cleaveland*, established the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which for value received of Holly, he had promised to pay the plaintiff and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this state, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result

(which I by no means concede), the effort should not be made in the face of manifest justice. The judgment should be affirmed.

JOHNSON, C. J., and DENIO, J., based their judgment upon the ground that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK, J., and GROVER, J., dissented.

Judgment affirmed.

II. Assignment of Contracts *

1. BY VOLUNTARY ACT OF THE PARTIES

(A) Assignment of Liabilities

ARKANSAS VALLEY SMELTING CO. v. BELDEN MIN. CO.

(Supreme Court of the United States, 1888. 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246.)

This was an action brought by a smelting company, incorporated by the laws of Missouri, against a mining company, incorporated by the laws of Maine, and both doing business in Colorado by virtue of a compliance with its laws, to recover damages for the breach of a contract to deliver ore, made by the defendant with Billing & Eilers, and assigned to the plaintiff. The material allegations of the complaint were as follows: On July 12, 1881, a contract in writing was made between the defendant of the first part and Billing & Eilers of the second part, by which it was agreed that the defendant should sell and deliver to Billing & Eilers, at their smelting works in Leadville, 10,000 tons of carbonate lead ore from its mines at Red Cliff, at the rate of at least 50 tons a day, beginning upon the completion of a railroad from Leadville to Red Cliff, and continuing until the whole should have been delivered, and that "all ore so delivered shall at once, upon the delivery thereof, become the property of the second party;" and it was further agreed as follows: "The value of said ore and the price to be paid therefor shall be fixed in lots of about one hundred tons each; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay; in case the parties hereto cannot agree as to such

* For discussion of principles, see Clark on Contracts (2d Ed.) §§ 194-197, 199, 200.

assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed on the basis hereinafter agreed upon by the closing New York quotations for silver and common lead, on the day of the delivery of sample bottle, and so on until all of said ore shall have been delivered. Said second party shall pay said first party at said Leadville for each such lot of ore at once, upon the determination of its assay value, at the following prices;" specifying, by reference to the New York quotations, the price to be paid per pound for the lead contained in the ore, and the price to be paid for the silver contained in each ton of ore, varying according to the proportions of silica and of iron in the ore.

The complaint further alleged that the railroad was completed on November 30, 1881, and thereupon the defendant, under and in compliance with the contract, began to deliver ore to Billing & Eilers at their smelting works, and delivered 167 tons between that date and January 1, 1882, when "the said firm of Billing and Eilers was dissolved, and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice;" that after such transfer and assignment the defendant continued to deliver ore under the contract, and between January 1 and April 21, 1882, delivered to Billing at said smelting works 894 tons; that on May 1, 1882, the contract, together with the smelting works, was sold and conveyed by Billing to the plaintiff, whereof the defendant had due notice; that the defendant then ceased to deliver ore under the contract, and afterwards refused to perform the contract, and gave notice to the plaintiff that it considered the contract canceled and annulled; that all the ore so delivered under the contract was paid for according to its terms; that "the plaintiff and its said assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the 'sample bottle,' by which expression was, by the custom of the trade, intended the completion of the assay or test by which the value of the ore was definitely fixed;" and that "the said Billing and Eilers, and the said G. Billing, their successor and assignee, at all times since the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready, and willing to and did comply with and perform all the terms of the same, so far as they were by said contract required; and the said plaintiff has been at all times able, ready, and willing to perform and comply with the terms thereof, and has from time to time, since the said contract was assigned to it, so notified the defendant."

The defendant demurred to the complaint for various reasons, one of which was that the contract therein set forth could not be assigned, but was personal in its nature, and could not, by the pretended assignment thereof to the plaintiff, vest the plaintiff with any power to sue the defendant for the alleged breach of contract. The circuit court sustained the demurrer, and gave judgment for the defendant; and the plaintiff sued out this writ of error.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. St. § 914; Code Civ. Proc. Colo. § 3; *Steel Co. v. Lundberg*, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982. The vital question in the case, therefore, is whether the contract between the defendant and Billing & Eilers was assignable by the latter, under the circumstances stated in the complaint. At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." *Humble v. Hunter*, 12 Q. B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305, 93 Am. Dec. 93; *Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King v. Batterson*, 13 R. I. 117, 120, 43 Am. Rep. 13; *Lansden v. McCarthy*, 45 Mo. 106.

The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pol. Cont. (4th Ed.) 425. The contract here sued on was one by which the defendant agreed to deliver 10,000 tons of lead ore from its mines to Billing & Eilers at their smelting works. The ore was to be delivered at the rate of 50 tons a day, and it was expressly agreed that it should become the property of Billing & Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the propor-

tions of lead, silver, silica, and iron thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price the defendant had no security for its payment, except in the character and solvency of Billing & Eilers.

The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted. The fact that upon the dissolution of the firm of Billing & Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger.

The technical rule of law, recognized in *Murray v. Harway*, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case. The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff, (which might perhaps be an assignable chose in action,) but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.

The cases cited in the careful brief of the plaintiff's counsel, as tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows:

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. *Sears v. Conover*, *42 N. Y. 113, 4 Abb. Dec. 179; *Tyler v. Barrows*, 6 Rob. (N. Y.) 104.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. *Hambly v. Trott*, Cowp. 371, 375; *Wentworth v. Cock*, 10 Adol. & E. 42, 2 Perry & D. 251; 3 *Williams, Ex'rs* (7th Ed.) 1723-1725. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract, although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question. *Dickinson v. Calahan*, 19 Pa. 227.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. *Taylor v. Palmer*, 31 Cal. 240, 247; *St. Louis v. Clemens*, 42 Mo. 69; *Philadelphia v. Lockhardt*, 73 Pa. 211; *Devlin v. New York*, 63 N. Y. 8.

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. *Robson v. Drummond*, 2 Barn. & Adol. 303; *Waggon Co. v. Lea*, 5 Q. B. Div. 149; *Parsons v. Woodward*, 22 N. J. Law, 196.

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case. Judgment affirmed.

(B) *Assignment of Rights*

(a) GENERAL RULE

COOLIDGE v. RUGGLES.

(Supreme Judicial Court of Massachusetts. 1819. 15 Mass. 387.)

Assumpsit on the following writing, viz.:

"Boston, October 1, 1812.

"For value received, I promise to pay the bearer hereof, six months after date, nine hundred and eighty dollars, provided the ship *Mary* arrives at a European port of discharge, free from capture and condemnation by the British.

Samuel Ruggles."

At the trial before Jackson, J., at the sittings here, after the last March term, it appeared that the said promise was made to one W. S. Skinner, the consideration whereof was a certain document, known by

the name of "a Sawyer license," which was intended for the protection of merchant vessels of the United States from capture by British cruisers, war then existing between the United States and Great Britain; and that, about two years after receiving the said note, the said Skinner transferred and delivered the same, with other effects, to the plaintiff, to be by him collected and passed to the credit of Skinner, in an account then open between him and the plaintiff, and upon which Skinner was indebted to the plaintiff. The signature of the defendant was admitted, and the plaintiff proved that the said ship *Mary*, mentioned in the said note, arrived at a European port of discharge, and there delivered her cargo in safety, without any capture or condemnation whatsoever.

A verdict was returned for the plaintiff, under the direction of the judge; and the defendant tendered a bill of exceptions as at common law, which was sealed by the judge. The question chiefly insisted on at the argument, and which alone was considered by the court, was, whether the plaintiff could maintain the action, as assignee of the note sued.

PARKER, C. J., delivered the opinion of the court.

The only question to which we have turned our attention in this case, is, whether the written promise declared on is negotiable in its nature, so that an action may be maintained upon it in the name of the plaintiff, who is assignee. And we are all of opinion that it is not so negotiable, on account of the contingency on which the payment of the money is made to depend.

All promises to pay money, being at common law choses in action, were unassignable. It is only by virtue of the statute of 3 & 4 Anne, c. 9, that certain descriptions of them are assignable, so as that the property and the right of action vest in the assignee.

The paper declared on does not come within the description of notes made assignable by that statute. For it has been declared by frequent judicial decisions, that a note or bill, to attain that character, must be payable in money absolutely. A note or bill payable to bearer stands upon the same ground as a note payable to order. The only difference is in the mode of transfer. The latter must be by indorsement; the former may be by delivery; but both must contain a promise to pay money unconditionally.

The cases which show that an action may be maintained by an assignee, in his own name, are all where there has been, after the assignment, a promise to pay to the assignee; and to this effect the case of *Fenner v. Mears*, 2 W. Bl. 1269, is unquestionably good law; and several cases have been decided by this court upon the same principle. In this case, no promise is shown to pay to the assignee.

Cases were cited to show that the promise in this case is assignable in equity. But the difference between that, and an assignment under the statute of Anne, is too well known to need explanation. The verdict is set aside and a new trial granted.

(b) EXCEPTIONS

CARTER & MOORE v. UNITED INS. CO. OF NEW YORK.

(Court of Chancery of New York, 1815. 1 Johns. Ch. 463.)

The bill was filed by the plaintiffs, as assignees of a policy of insurance, underwritten by the defendants, for William Titus and George Gibbs, on which the plaintiffs claimed payment for a total loss. The insurance was on 500 barrels of flour from Newport to St. Jago de Cuba, on board the Spanish brig *Patriota*, which was captured by a Carthagena privateer. On the 21st of December, 1814, the policy was assigned by Titus & Gibbs to the plaintiffs, in trust, for themselves and other creditors of Titus & Gibbs. The bill charged that the defendants refused to pay the loss, alleging, among other things, that the plaintiffs had no title to the property insured, which, in fact, belonged to one J., a Spaniard, and not to Titus & Gibbs. The bill prayed that the defendants might answer the matter charged in the bill, and be compelled to pay the plaintiffs the amount insured, as for a total loss.

To this bill the defendants demurred on the following grounds: that it appeared by the bill that the plaintiffs' demand, or cause of action, was properly cognizable in a court of law; as it is not alleged that Titus & Gibbs refused to let the plaintiffs make use of their names, in a suit at law; or that they are, in any way, hindered from prosecuting at law; or that they stood in need of any discovery to aid them in such action.

KENT, Ch. The demand is properly cognizable at law, and there is no good reason for coming into this court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs & Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the chancellor, in the analogous case of *Dhegetoft v. The London Assurance Company*, Mosely, 83, that, at this rate, all policies of insurance would be tried in this court. In that case the policy stood in the name of a nominal trustee; but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed in parliament. 3 Bro. P. C. 525.

The bill, in this case, states no special ground for equitable relief; nor is any discovery sought which requires an answer. Bill dismissed, with costs.

ALLEN v. BROWN.

(Court of Appeals of New York, 1870. 44 N. Y. 228.)

Brown, the defendant, was employed by Cook, Clark and Cary to settle a claim they had together with him against a railroad company. He settled the claims by taking in payment thereof certain coupon bonds, one fourth of which he delivered to each of the other claimants, and also certain notes which were afterwards paid and the proceeds retained by the defendant. Cook, Clark and Cary assigned their claims to Allen, by whom suit was brought against the defendant.

A judgment in favor of the plaintiff entered upon the report of a referee was affirmed by the Supreme Court at General Term, and defendant appeals.

HUNT, C.* The appellant insists that the assignment from Cook, Clark, and Cary to the plaintiff, conveyed no title upon which this suit could be brought. This point is based upon the evidence given by Mr. Cook, when he testifies, "Allen paid me nothing, and I agreed with him that I would take care of the case, and if he got beat it should not trouble or cost him anything."

I am of the opinion that the assignment is sufficient to sustain this action.

The Code abolishes the distinction between actions at law and suits in equity, and between the forms of such actions. Section 69 (3339). It is also provided, in section 111 (449), that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113 (449). The latter section provides that an executor, administrator, trustee of an express trust, may sue in his own name. These provisions pretended to abolish the common law rule, which prohibits an action at law otherwise than in the name of the original obligee or covenantee, although he had transferred all his interest into bond or covenant to another. It accomplishes fully that object, although others than the assignee may have an ultimate beneficial interest in the recovery. In a case like the present, the whole title passes to the assignee, and he is legally the real party in interest, although others may have a claim upon him for a portion of the proceeds. The specific claim, and all of it, belongs to him. Even if he be liable to another as a debtor upon his contract for the collection he may thus make, it does not alter the case. The title to the specific claim is his. *Durkin v. Ireland*, 14 N. Y. 322; *Williams v. Brown*, *41 N. Y. 486, and cases cited; *Paddon v. Williams*, 1 Rob. 340; s. c., 2 Abb. Prac. (N. S.) 88. * * *

* The statement of facts is abridged, and a portion of the opinion of Hunt, C., and the concurring opinion of Leonard, C., are omitted.

2. BY OPERATION OF LAW

(A) Assignment of Obligations on Transfer of Interests in Land

GORDON v. GEORGE.

(Supreme Court of Indiana, 1859. 12 Ind. 408.)

HANNA, J. Sarah George, the appellee, gave a written lease to one Black, stipulating therein that Black should have the use of a parcel of land for five years; in consideration of which Black was to clear the land and make it ready for the plow, and leave the premises in good repair. It was further agreed that Black should build a cabin and smoke-house, and dig a well on the premises, for which Sarah George was to pay twenty-five dollars and thirty-seven cents. Before clearing the land or building the cabin, etc., Black assigned the lease, by indorsement, to the said James Gordon, appellant.

Gordon sued before a justice, alleging that he had built the house and smoke-house and dug the well; that the time had expired, and the lessor refused to pay for said house, etc.

The plaintiff recovered a judgment before the justice for forty-two dollars. On appeal to the Common Pleas, the defendant had a verdict and judgment for twelve dollars.

The defendant, among other things, set up, by way of counter-claim, that the plaintiff had not cleared the ground according to contract, etc.

The plaintiff asked the court to instruct the jury, that, "if the jury find the matters of counter-claim of the defendant exceed the amount which the jury may find due the plaintiff, the jury cannot find against the plaintiff such excess," which was refused. Upon this ruling of the court, the only point made, by brief of counsel, is predicated.

By the statute (2 R. S. p. 120) plaintiff may dismiss his action; but by section 365, "In any case, where a set-off or counter-claim has been presented, which, in another action, would entitle the defendant to a judgment against the plaintiff, the defendant shall have the right of proceeding to the trial of his claim, without notice, although the plaintiff may have dismissed his action, or failed to appear."

So, in *Vassear v. Livingston*, 13 N. Y. 252, it is said that, "a counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant."

In *Howland v. Coffin*, 9 Pick. 52, it was held by the Supreme Court of Massachusetts, "that the assignee of the lessee is liable to the assignee of the lessor in an action of debt for the time he holds; for though there is no privity of contract, there is a privity of estate which creates a debt for the rent." See authorities cited.

In another case between the same parties, it is said (12 Pick. 125) "the defendant took the term subject to all the advantages and disadvantages attached to it by the terms of the lease. The covenant for the payment of the rent ran with the land, and by the assignment of the term became binding on the defendant." See *Farmers' Bank v. Mutual Ins. Soc.*, 4 Leigh (Va.) 69; *Taylor's Landlord and Tenant*, 76; *Provost v. Calder*, 2 Wend. (N. Y.) 517; *Verplanck v. Wright*, 23 Wend. (N. Y.) 506; *In re Galloway*, 21 Wend. (N. Y.) 32, 34 Am. Dec. 209; *Vernon v. Smith*, 5 Barn. & Adol. 1.

It resolves itself into the question, then, under the above, and section 59, p. 41, of the same statute, and the authorities cited, whether the plaintiff was liable to the defendant for the non-performance of the contract of his assignor. We think, under the circumstances of this case, he was. He became the assignee of the whole interest of Black, before any part of the contract was performed. By receiving an assignment of the lease, and taking possession of the land under it, he surely became liable to perform the stipulations of that lease, so far as they had reference to improvements upon said land, if no others, of which we do not decide, as it is not necessary to do so.

The ruling of the court upon the instruction was correct. The judgment is affirmed, with 10 per cent. damages and costs.

(B) Assignment of Contractual Obligation by Marriage

HOWARTH v. WARMSER et al.

(Supreme Court of Illinois, 1871. 58 Ill. 48.)

Action by Leopold Warmser and Nathan Gutner, partners, doing business as Warmser & Co., against James Howarth and wife on a promissory note given by the wife dum sola. Judgment against defendants. Howarth appeals.⁵

LAWRENCE, C. J. We held in *Connor v. Berry*, 46 Ill. 370, 95 Am. Dec. 417, and *McMurtry v. Webster*, 48 Ill. 123, that the husband was still, as at common law, liable for the debts of his wife, contracted before marriage notwithstanding the act of 1861, because that act still left to the husband the wife's earnings. Since those decisions were made, the legislature, by the act of 1869, has taken from the husband all control over the earnings of his wife, and thus swept away the last vestige of the reasons upon which the common law rule rested. The rule itself must now cease. Legislative action has

⁵ The statement of the case is abridged.

virtually abolished it, by taking away its foundations and rendering its enforcement unjust.

The judgment must be reversed and the cause remanded. Judgment reversed.

(C) Assignment of Contractual Obligation by Death

Appeal of BILLINGS.

(Supreme Court of Pennsylvania, 1884. 106 Pa. 558.)

This was a bill in equity filed by Charles F. Billings and Abbie B. McNeil, against Sarah M. Billings, Jefferson Harrison and William Putnam, praying for an injunction to restrain the defendants from committing waste by cutting timber on certain lands, and for an account of timber cut.

Appeal from decree dismissing the bill.

CLARK, J.⁶ Silas X. Billings, who died intestate, on the 13th day of October, 1879, was, at the time of his death, the owner in fee of certain tracts of land, situate in the counties of Tioga and Potter, containing in the aggregate 38,157 acres. He left to survive him a widow, Sarah M. Billings, a brother, Charles F. Billings, and a sister, Abbie, wife of P. S. S. McNeil the brother and sister named, being of the whole blood and other brothers and sisters of the half blood.

In his lifetime, on the 25th of September, 1879, he entered into a written contract with Henry Colton, to cut the pine timber on about 5,000 acres of the land, and deliver it into the boom at Williamsport, on certain terms in the contract mentioned; on the same day in the presence of Billings, Colton contracted with William Putnam, for the performance of part of the work. About the first day of October, 1879, Colton or Putnam, pursuant to the contract, and at large expense, began the cutting out and repairing of the roads, building of camps, &c. Billings, as we have stated, died on the 13th of October, 1879. Henry Colton also died on the 10th day of August, 1880, having first made his last will and testament in which, after appointing Jefferson Harrison the executor thereof, he authorized the said executor "to continue the work, under the contract made, as aforesaid, with Silas X. Billings, and to execute the said contract according to its true intent and meaning, as fully and to the same extent, as the testator could do if living."

Under a partition which was afterwards made of the lands of said Silas X. Billings, between the widow and heirs, about 19,000 acres, including the lands, the timber upon which was the subject of the

⁶ The statement of the case is abridged and a portion of the opinion omitted.

Colton contract, were on the 24th March, 1881, allotted as dower, and set apart to the widow for life.

The plaintiffs in this case are the heirs at law of the full blood of Silas X. Billings, deceased; the defendants, Sarah M. Billings and Jefferson Harrison, are the legal representatives of the original parties to the agreement of 25th September, 1879, whilst William Putnam is the employee of Harrison.

The bill charges the commission of waste in the removal of the pine timber from the 5,000 acres aforesaid, embraced within the boundary set apart to the widow, and the prayer of the bill is for an injunction, also for an account of the proceeds in the defendants' hands. The right to an account, however, is predicated of the waste, and it follows that if the defendants have committed no waste, there can be no decree for an account.

The plaintiffs maintain that the contract under which the defendants assume to act is personal in its character; that it provides for the performance of such services, and the exercise of such personal skill and experience upon the part of Colton, in the matters involved, as necessarily limited its performance to Colton himself; and, further, that the contract is such that at the death of Billings, its continuance devolved such duties, and created such obligations upon his legal representatives as are inconsistent with the settlement of his estate; that, therefore, the survival of the contract was necessarily not in contemplation of the parties at the time of its execution. It is urged, therefore, that upon the death of either party, the obligation of the contract ceased as to both.

It is certainly true that the rights and responsibilities of executors and administrators depend, in many cases, upon the relations of the original parties; the former do not, in all cases, succeed to the contracts of the latter; what may be termed mere contract, personal relations do not survive. Where the agreement is for services which involve the peculiar skill of an expert, by whom alone the particular work in contemplation of the parties can be performed, or more generally, where distinctly personal considerations are at the foundation of the contract, the relation of the parties is dissolved by the death of him whose personal qualities constituted the particular inducement to the contract. The casus must be such, however, as to wholly prevent the performance of the contract; what is impossible to be done cannot be required to be done, and a subsequent intervening incapacity will, in such case, work a dissolution of the contract.

But where a party agrees to do that which does not necessarily require him to perform in person, that which he may, by assignment of his contract or otherwise, employ others to do, we may fairly infer, unless otherwise expressed, that a mere personal relation was not contemplated. It is true also, perhaps, that a contract may involve matters of such a nature as to render the performance of them so incompatible with the settlement of a decedent's estate, and so in-

consistent with the general duties of an administrator or executor that, in the absence of any express provision to the contrary, the parties may be presumed, as in the case of *Dickinson v. Calahan's Administrator*, 19 Pa. 227, to have intended its dissolution at death. The whole question, in each case, is one for construction, and depends upon the intention of the parties, that intention to be found under the rules regulating the construction of contracts in general. Resorting, in the first instance, to the instrument itself, we find there an express provision "that for the faithful performance of each and every the covenants and agreements aforesaid, each of said parties doth bind himself, his heirs, executors and administrators, to the other his heirs, executors and administrators, firmly by these presents."

In this respect *Dickinson v. Calahan's Administrator* is clearly distinguishable from the case at bar; the contract there exhibited nothing upon its face which indicated any purpose of the parties, that, in case of death, their legal representatives should succeed to their rights, and incur the obligation of a full and continuous performance of the contract. We discover nothing in the nature of the obligations assumed, or of the duties to be performed on either side, that would tend to create any merely personal relation between the parties, or involve such a performance as would indicate that a survival of the contract was not in contemplation; a contrary intention, however, is distinctly shown by the subsequent conduct of the parties. On the same day on which the contract was executed, Colton made an agreement with Putnam in the presence, and with the apparent concurrence of Billings, by the terms of which Putnam agreed to cut and deliver the said timber at the mouth of State Run, ready for floating; Putnam began the work on the 1st October, 1879, and, during the lifetime of Billings and with his knowledge, built camps, constructed and repaired roads, &c., &c. After Billings' death, and until the commencement of this suit, he continued cutting and stocking the timber from year to year, with the knowledge of the plaintiffs, and without objection on their part. In the winter of 1879-80 he delivered into the boom at Williamsport 3,100,000 feet of logs; in the winter of 1880-81, 5,412,000 feet, and in the winter of 1881-82, 4,756,000 feet; it is estimated that about 2,150,000 feet remain, and at the filing of this bill Harrison and Putnam were proceeding to cut and deliver this remaining timber into the boom at Williamsport, in accordance with the original contract.

The master finds that the plaintiffs had a general knowledge of what Putnam was doing upon the lands from time to time as the work progressed; and, that up to the bringing of this suit they made no objection, either to the cutting, transportation or delivery of the timber pursuant to the Colton contract, although they did object to the subsequent disposition of the timber, and of its proceeds. Indeed, it appears that after the death of Colton, at the instance of his executor, various meetings of the parties in interest were held for consultation

as to the execution of the contract. At one of these meetings, held in September, 1880, the plaintiffs were present and stated that "they wished the Colton contract carried out as it read," and that on the delivery of the logs at Williamsport in the boom, they would determine as to what disposition should be made of them; at another held in August, 1881, Mr. Harrison reported what had been done up to that time, and stated what he intended to do in the ensuing season, all of which was received as satisfactory.

It seems clear, not only that Silas X. Billings and Henry Colton, but their heirs and representatives, since their decease, by their acts and acquiescence, have uniformly interpreted this contract as one which did not involve a merely personal relation. From the words of the contract itself, therefore, from the nature of the subject matter it contains, and from the concurrent acts of the parties, we are led unmistakably to the same conclusion. * * *

The decree is affirmed, and appeal dismissed at the cost of the appellant.

III. Joint and Several Contracts[†]

1. JOINT CONTRACTS

CITY OF PHILADELPHIA v. REEVES & CABOT.

(Supreme Court of Pennsylvania, 1865. 48 Pa. 472.)

This was an action of covenant, by the City of Philadelphia against Samuel J. Reeves and Joseph Cabot, as sureties of Fort Ihrie. After a declaration in the usual form, on a covenant dated May 9th 1859, between the plaintiff and defendants, for the use of a wharf or landing at the foot of Callowhill street, on the river Delaware; the defendants cravedoyer of the instrument on which suit was brought.

The plaintiffs thereupon placed on record a copy of the following instrument:

"Memorandum. The City of Philadelphia demise to Fort Ihrie the wharf or landing at the foot of Callowhill street, on the river Delaware, and the pier and wharf next south thereof, being the same premises heretofore called and known as the Callowhill Street Ferry and Landing, for the term of three years from April 25th 1859, at the annual rent of twenty-three hundred dollars, payable quarterly: the first payment to be made on the 25th day of July 1859; and if the rent shall remain unpaid on any day on which the same ought to be paid, then the lessors may enter on the premises and proceed, by dis-

[†] For discussion of principles, see Clark on Contracts (2d Ed.) §§ 203, 207.

tress and sale of the goods there found, to levy the rent and all costs. The lessee and his sureties, Joseph Cabot and Samuel J. Reeves, covenant with the lessors to pay the rent punctually as above provided for, and the lessee covenants during the term to keep, and at the end thereof peaceably to deliver up the premises, in good order and repair, reasonable wear and tear and damage by accidental fire excepted, and not assign this lease or underlet the premises, or any part thereof. * * *

"In witness whereof the lessee and his sureties have hereunto set their hands and seals, and the corporate seal of the lessors has been hereunto affixed by the mayor of the city of Philadelphia, this 9th day of May, A. D. 1859, the said lease having been awarded prior to the election of the said lessee as a member of common council.

" [Signed] Fort Ihrie. [Seal.]
 Samuel J. Reeves. [Seal.]
 Joseph Cabot. [Seal.]

"Sealed and delivered in the presence of E. B. McDowell.

" [Seal.] Alexander Henry,
 "Mayor of Philadelphia."

This instrument being read and heard, the defendants by their attorney prayed judgment of the said writ and declaration, because the supposed covenant in the said declaration mentioned, if any such were made, was jointly made with Fort Ihrie, who sealed and delivered also the said deed, who is still living, to wit, &c., and not by the said Samuel J. Reeves and Joseph Cabot alone, wherefore, inasmuch as the said Fort Ihrie is not named in the said writ and declaration together with the said Samuel J. Reeves and Joseph Cabot, they, the said Samuel J. Reeves and Joseph Cabot, prayed judgment of the writ and declaration and that the same may be quashed, &c.

To this the plaintiff demurred, and stated the following cause of demurrer, viz., "that the instrument of which there has been oyer, shows on the face thereof that the said defendants are bound as sureties for the said Fort Ihrie, and that by reason of the subject matter the said covenant is not jointly with said Fort Ihrie," &c.

The court below entered judgment for the defendants on the demurrer, which was the error assigned.

STRONG, J.⁸ That the covenant for the payment of rent, upon which this suit was brought, imposed upon the defendants only an obligation jointly with Fort Ihrie, their principal, is too clear for doubt. It is a general presumption of law, when two or more persons undertake an obligation, that they undertake jointly. Words of severance are necessary to overcome this primary presumption. In all written contract therefore, whether the liability incurred is joint or several, or joint and several, is to be determined by looking at the words of the instruments, and at them alone. The subject-matter of the contract,

⁸ A portion of the lease is omitted.

and the interests of the parties assuming a liability, have nothing to do with the question. It may be otherwise with respect to the rights of the covenantees, where there are more than one. There are not wanting cases in which it has been held that when the interests of the covenantees are several, they may sue severally, though the terms of the covenant upon which they sue are strictly joint. Even this, however, has been doubted. But, however it may be with the rights of covenantees, it is a settled rule that whether the liability of covenantors is joint, or several, or both, depends exclusively upon the words of the covenant. And the language of severalty or joinder is the test. The covenant is always joint, unless declared to be otherwise. *Enys v. Donnithorne*, 2 Burrows, 1190; *Philips v. Bonsall*, 2 Binn. 138. It is true, that in the covenant to pay rent, contained in the lease to Fort Ihrie, the two defendants are described as sureties, but they and the lessee undertook to pay the rent as one party. Their being described as sureties cannot be regarded as a declaration of intent to undertake severally. Nor does the covenant contain any words of several liability for rent. The defendants assumed no other obligation than that they and the lessee would pay. The case is indubitably within the general rule that a covenant by two or more is joint as to them, if not expressly declared several, or joint and several.

The plea in abatement was therefore correctly sustained, and the judgment on the demurrer was right. The judgment is affirmed.

2. CONTRACTS BOTH JOINT AND SEVERAL

PRESIDENT, ETC., OF BANGOR BANK v. TREAT.

(Supreme Judicial Court of Maine, 1829. 6 Greenl. 207, 19 Am. Dec. 210.)

MELLEN, C. J. This is an action of assumpsit and the declaration states that the note was signed by the defendants and Allen Gilman jointly and severally; and that a judgment had been recovered on the note against Gilman in a several action against him. The defendants have moved in arrest of judgment on account of the joinder of them in the present suit.

When three persons by bond, covenant, or note jointly and severally contract, the creditor may treat the contract as joint or several at his election, and may join all in the same action or sue each one severally; but he cannot, except in one case, sue two of the three, because that is treating the contract neither as joint or several. But if one of the three be dead, and that fact be averred in the declaration, the surviving two may be joined.

In the present case Gilman is living. The plaintiffs contend that as judgment had been recovered against him, such judgment entitled them to join the other two in the same manner as though he was dead. This is not so. When they sued Gilman alone, they elected to consider the promise or contract as several; and having obtained judgment they are bound by such election. In case of death, the act of God has deprived the party of the power of joining all the contractors, but he may still consider the contract as joint, and sue the surviving two.

The plaintiffs have disabled themselves from maintaining this action by their former one. 1 Saund. 291 e. The objection is good on arrest of judgment where the fact relied on by the defendants appears on the record, as in the present case. Judgment arrested.

INTERPRETATION OF CONTRACT

I. Rules Relating to Evidence ¹

1. PROOF OF DOCUMENT

RICHMOND & D. R. CO. v. JONES.

(Supreme Court of Alabama, 1891. 92 Ala. 218, 9 South. 276.)

Action by D. W. Jones against the Richmond & Danville Railroad Company for personal injuries alleged to have been caused by defendant's negligence. There were three counts in the complaint. The first count sought to recover on the ground that the injuries were caused by reason of defects in the condition of the ways, works, machinery, or plant connected with or used in the employ of defendant. In the second count of the complaint the plaintiff based his right of recovery on the alleged negligence of the employés of the defendant who had charge and control of the train by which plaintiff was injured, and at the time of the accident. The third count was for failure of the fireman on defendant's engine to transmit plaintiff's signal to the engineer.

The defendant pleaded the general issue, and by special plea pleaded a written contract of employment entered into between the plaintiff and the defendant on February 17, 1890,—not quite two months before the accident,—one of the terms of which was in words as follows: "Rule 23. The conditions of employment by the company are that the regular compensation paid for the services of employés shall cover all risks incurred and liability to accident from any cause whatever while in the service of this company. If an employé is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized. Allowances, when made in such cases, will be as a gratuity, justified by the circumstances of the case, and previous good conduct of the party. The fact of remaining in the service of the company will be considered acceptance of these conditions. All officers employing men to work for this company will have these conditions distinctly understood and agreed by each employé before he enters the service of the company."

A demurrer to the plea was sustained. There was judgment for the plaintiff, and defendant appeals.

¹ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 209-217.

COLEMAN, J.* * * * Defendant's counsel, having the paper, Exhibit A, in his hands, handed it to plaintiff while on cross-examination as a witness, and asked him if he signed it. Plaintiff's counsel requested to see the paper, which request defendant's counsel refused, saying he had not offered it in evidence. The court stated that it should be shown to plaintiff's counsel when the paper was offered in evidence. Plaintiff then answered that it was his signature. The defendant afterwards offered the paper in evidence, to which the plaintiff objected, on the grounds that there was an attesting witness, and the execution of the paper had not been properly proven.

Opposing counsel have the right to object to improper questions to witnesses, and the rules of practice require them to specify the grounds of objection. Any advantage taken, by which a party is deprived of the exercise of this right in the trial of a case without neglect or fault on his part, should not be used to his prejudice. If defendant did not purpose to introduce the paper in evidence, the question to the witness was improper. If it was the intention to offer it in evidence, then it should have been submitted to opposing counsel, so that, if he wished to object, the objection could be made in proper form. The ruling of the court sustaining the objection to the introduction of the paper is supported also on other principles. The case of Ellerson v. State, 69 Ala. 3, after stating the general rule that the attesting witness should be called to prove the execution of an instrument, declares that the rule extends to every private writing which the parties may have chosen to cause to be attested. The witness is considered as the person selected and referred to for the purpose of proving the fact of execution, and the facts and circumstances attending it; citing 1 Greenl. Ev. §569. So long as the evidence of the subscribing witness can be produced, it is the best—the primary and only—evidence of execution. The admissions or declarations of the parties themselves to the instrument (not made in open court, or in writing, for the purpose of a trial, when they are the parties litigant) are not admissible for this purpose. Russell v. Walker, 73 Ala. 317.

It is contended that Exhibit A was not offered in evidence as a contract binding upon plaintiff, but merely to establish the existence of rule 20, and notice to plaintiff, and for this purpose it was admissible. The proposition contended for necessarily must be that, the rule being incorporated in the contract as a part of it, its existence and materiality as evidence against the plaintiff may be established by offering in evidence the contract without legal proof of its execution. The reasoning is not sound. To establish the existence of the rule and notice thereof the defendant was forced to rely upon an unproven contract. If the contract is excluded because its existence is not proven, it cannot be said that admissions which alone appear in the contract have been proven. If plaintiff had not admitted his sig-

* A portion of the opinion is omitted.

nature, the paper would not have been offered in evidence. The admission having been improperly obtained, and the execution of the paper not proven, it was not admissible for any purpose. * * * Affirmed.

2. PAROL EVIDENCE

(A) In General

SMITH v. WILLIAMS.

(Supreme Court of North Carolina, 1810. 5 N. C. 426. 4 Am. Dec. 564.)

This was an action on the case for a breach of warranty in the sale of a negro. The declaration stated, "that the defendant warranted the negro to be sound and healthy as far as he knew; that the negro was unsound and unhealthy, being afflicted with a rupture, and that the defendant well knew he was so afflicted at the time of the warranty and sale." The jury found a verdict for the plaintiff, subject to the opinion of the court on a point of law reserved in the course of the trial, viz.: Whether the plaintiff could be permitted to prove such a warranty, when at the delivery of the negro, upon the sale, he received from the defendant a written instrument, but not under seal, in the following words:

"Know all men by these presents, that I, Obed Williams, of the county of Onslow, and state of North Carolina, have bargained and sold unto David Smith, of the aforesaid county and state, one negro fellow, named George, about thirty years of age, for and in consideration of three hundred dollars. I do warrant and defend the said negro against the lawful claim or claims of any person or persons whomsoever, unto him the said Smith, his heirs and assigns forever. Given under my hand this 29th January, 1802.

"Obed Williams.

"Teste: George Roan."

This instrument had been proved in Onslow county court, and registered. The point reserved was sent to this court.

TAYLOR, J. The contract between the parties is stated at length in the special case, and appears to be both formally and substantially a bill of sale in all respects, except as to the want of a seal. This omission, however, is so important in the legal estimation of the paper, that it cannot be classed amongst specialties, but must remain a simple contract, on which no additional validity can be conferred by the subsequent registration. For I do not apprehend that any legal effect can be given to a paper by recording it, if that ceremony were not required by law.

It might not, however, be an useless enquiry to consider, whether a paper containing nearly all the component parts of a specialty or deed, does not advance some greater claims to be respected in the scale of evidence, than such proofs of a contract as rest upon the memory of witnesses.

The solemnity of sealed instruments has been, from the earliest periods of the law, highly regarded; because the forms and ceremonies which accompany them, bespeak deliberation in the parties, and afford a safe ground for courts and juries to ascertain and settle contested rights. This deliberation is inferred, not from any one circumstance attending the transaction, but as the general effect of the whole. Thus in *Plowd.* 308, B: "It is said that deeds are received as a lien final to the party making them, although he received no consideration, in respect of the deliberate mode in which they are supposed to be made and executed; for, first, the deed is prepared and drawn; then, the seal is affixed; and lastly, the contracting party delivers it, which is the consummation of his resolution." Hence it appears, that the law gives to deeds a respect and importance which it denies to any other contracts; not an empty and unmeaning respect, but such as properly arises from the existence of all those circumstances which are calculated to fix and make authentic the contracts of men.

A contract cannot be a deed, if either it is not prepared and drawn; if the seal be not affixed, or if it be not delivered; but still if the deliberation is inferred from all these circumstances, it is fair reasoning to presume some degree of deliberation from any one or two of them, and to give to the paper, when it is introduced as evidence of the parties' transaction, precisely such credence as belongs to it, from its partaking more or less of the nature of a deed.

To give this rule a practical application to the case before us, the conclusion would be, that as the paper is without a seal, it cannot be a deed, and is therefore not decisive evidence as that instrument is; it is not a final lien; but as it possesses some of the essentials of a deed, viz. a formal draught and delivery, so far it shall be regarded as evidence of no slight nature of the fact it is introduced to establish.

The writers on the law of evidence have accordingly, in arranging the degrees of proof, placed written evidence of every kind higher in the scale of probability than unwritten; and notwithstanding the splendid eloquence of Cicero, to the contrary, in his declamation for the poet Archias, the sages of our law have said that the fallibility of human memory weakens the effect of that testimony which the most upright mind, awfully impressed with the solemnity of an oath, may be disposed to give. Time wears away the distinct image and clear impression of the fact, and leaves in the mind, uncertain opinions, imperfect notions and vague surmises.

It is, however, contended by the plaintiff, that contracts by our law are distinguished by specialty and by parol; that there is no third kind, and that whatever is not a specialty, though it be in writing, is

by parol. To establish this position, a case is cited from 7 Term R. 350, by which it is certainly proved. But the position being established, whether it will authorize the inference that parol evidence is admissible to vary and extend written evidence, will best appear from an examination of the case, and from some attention to the question which called for the solution of the court.

In the case cited, the declaration states, that the defendant, being indebted as administratrix, promised to pay when requested, and the judgment is against her generally. From this statement it is manifest, that the promise could not be extended beyond the consideration which was in another right as administratrix, and made to bind the defendant personally. But in order to avoid this objection, it was contended, that the promise being reduced to writing, the necessity of a consideration was dispensed with; and that the fact of its having been made in writing, might well be presumed after verdict, if necessary to support the verdict, which latter position was conceded by the court.

It is, then, perfectly evident, that the only question in the case was, whether nudum pactum could be alleged against a contract in writing, but without seal? That it could not, had been a notion entertained by several eminent men, and amongst the rest by the learned commentator, who observes that "every bond, from the solemnity of the instrument, and every note, from the subscription of the drawer, carries with it internal evidence of a good consideration." This doctrine, however, is inaccurate as applied to notes, when a suit is brought by the payee, and is only correct as between the indorsee and drawer. To demonstrate the propriety of the objection, it became necessary for the court, in *Ram v. Hughes*, to enter into a definition and classification of contracts, into those by specialty and those by parol; to which latter division every contract belongs that is not sealed, though it may be written. Every written unsealed contract is, therefore, in the strict language of legal precision, a parol contract, and like all others, must be supported by a consideration.

But let it be considered, what the court would have said, if the case, instead of requiring them to give a precise and comprehensive definition of contracts, had called upon them for a description of the evidence by which contracts may be supported. They would, I apprehend, have said, (because the law says so,) the evidence which may be adduced in proof of a contract is threefold: 1st, matter of record; 2d, specialty; 3d, unsealed written evidence, or oral testimony. It is therefore necessary to distinguish between a contract, and the evidence of a contract, for though they may be, and are, in many cases, identified; yet, in legal language, a parol contract may be proved by written evidence. This is the case now before us, and this brings me to the question it presents, which I understand to be, whether oral evidence is proper to extend and enlarge a contract which the parties have committed to writing?

The first reflection that occurs to the mind upon the statement of the question, independent of any technical rules, is, that the parties, by making a written memorial of their transaction, have implicitly agreed, that in the event of any future misunderstanding, that writing shall be referred to, as the proof of their act and intention; that such obligations as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract; because, if they meant to be bound by any such, they might have added them to the writing; and thus have given them a clearness, a force, and a direction, which they could not have by being trusted to the memory of a witness. For this end, the paper is signed, is witnessed, and is mistakenly recorded. But the plaintiff says, "Besides the warranty of title contained in the writing, the defendant made me another warranty as to the quality, which I can prove by a witness present at the time; and though he has complied with the warranty which was committed to writing, yet he has broken the one which was orally made, whence I am injured and seek compensation."

We are then to decide, whether the law deems such proof admissible.

By the common law of England, there were but few contracts necessary to be made in writing. Property lying in grant, as rights and future interests, and that sort of real property, to which the term incorporeal hereditament applies, must have been authenticated by deed. So the law remained until St. 32 Hen. VIII., which, permitting a partial disposition of land by will, required the will to be in writing; but estates in land might still be conveyed by a symbolical delivery in presence of the neighbors, without any written instrument; though it was thought prudent to add security to the transaction by the charter of feoffment. The statute of 29 Car. II., commonly called the statute of frauds, has made writing and signing essential in a great variety of cases wherein they were not so before, and has certainly increased the necessity of caution in the English courts, with respect to the admission of verbal testimony, to add to or alter written instruments, in cases coming within the provisions of that statute. That law, being posterior to the date of the charter under which this state was settled, has never had operation here; so that the common law remained unaltered until the year 1715, when a partial enactment was made of the provisions of the English statute.

The law must therefore be sought for in cases arising before the statute of frauds, and expositions upon that statute are no otherwise authoritative than as they affirm or recognize the ancient law. But I believe there can be no doubt that the rule is as ancient as any in the law of evidence, and that it existed before the necessity of reducing any act into writing was introduced.

In Plowd. 345, Lord Dyer remarks, "Men's deeds and wills, by

which they settle their estates, are the laws which private men are allowed to make, and they are not to be altered even by the king, in his courts of law or conscience."

In *Rutland's Case*, 5 Coke, the court resolved that it was very inconvenient that matters in writing should be controlled by averment of parties, to be proved by uncertain testimony of slippery memory, and should be perilous to purchasers, farmers, &c.

The case of *Meres v. Ansel*, 3 Wilson, 275, is directly in point upon the general principle, to shew that parol evidence shall not be admitted to contradict, disannul or substantially vary a written agreement.

In 2 Atk. 384, Lord Hardwicke says: "It is not only contrary to the statute, but to common law, to add anything to a written agreement by parol evidence."

All written contracts, says Justice Ashurst, whether by deed or not, are intended to be standing evidence against the parties entering into them. 4 Term R. 331.

1 Ves. Jr. 241, parol evidence to prove an agreement made upon the purchase of an annuity that it was redeemable, was rejected.

In a very recent case, in 7 Ves. 211, we are furnished with the opinion of the present master of rolls, Sir William Grant, than whom no judge ever ranked higher in the estimation of his contemporaries, for profound and accurate knowledge in legal science, and a proper and discriminating application of well grounded principles to the cases which arise in judgment before him. His observations are, "By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that enquiry that the rule was adopted. Though the written instrument does not contain the terms, it must, in contemplation of law, be taken to contain the agreement, as furnishing better evidence than any parol can supply."

To these authorities, I will add a decision of the circuit court of Pennsylvania, because it appears to be in principle the very case under consideration.

An action on the case was brought by the assignee of a bond against the assignor, upon a written assignment in general terms. The plaintiffs offered oral evidence to shew that the defendant had expressly guaranteed the payment of the bond. "Chase, Justice. You may explain, but you cannot alter a written contract by parol testimony. A case of explanation implies uncertainty, ambiguity and doubt upon the face of the instrument. But the proposition now is a plain case of alteration; that is, an offer to prove by witnesses, that the assignor promised something beyond the plain words and meaning of his written contract. Such evidence is inadmissible, and has been so adjudged in the supreme court, in *Clarke v. Russel*, 3 Dall. 415, 1 L. Ed. 600.

I grant that chancery will not confine itself to the strict rule, in cases of fraud, and of trust; but we are sitting as judges at common law, and I can perceive no reason to depart from it."

I suppose the above authorities are amply sufficient to establish the proposition for which they are cited, and therefore I forbear to make any other references for that purpose. The exceptions to the general rule may be comprised under the heads of fraud, surprise, mistake, in cases of resulting trust, to rebut an equity, or to explain latent ambiguities; and there may also be some other cases which cannot be properly ranged under the titles specified. But as the case stated is, in my opinion, directly opposed by the general rule, so far as it seeks to establish the proof of warranty as to quality, by parol, and presents no fact to bring it within any of the exceptions, it would be needless to multiply authorities with respect to them.

As to the exception on the ground of fraud, I conceive that only occurs, where something intended to have been inserted in the contract, is omitted through the misrepresentation or unfair practice of one of the parties. In such case, the omission may be supplied by parol evidence. But there is no allegation here that the additional warranty was intended or understood by either party to have been inserted in the agreement.

It is also necessary to attend to the nature of the remedy adopted by the plaintiff in this case, which is founded on the warranty, and is in *assumpsit*. The questions arising upon the general issue are, whether the warranty was made, and whether it was true at the time of making. For if the warranty were made, and not complied with, it is wholly immaterial whether the defect was known to the seller or not, — a principle that seems to extend to every case where the plaintiff proceeds on the warranty. But in an action of deceit, the scienter or fraud is a material part of the declaration, and must be brought home to the defendant to authorize a recovery against him, and in such case it seems, from the authorities, that proofs of the fraudulent conduct of the defendant may be drawn from sources dehors the written contract.

It cannot be contended that inserting the scienter in a declaration on the warranty, will convert it into an action of deceit founded on tort. In the latter action, the knowledge of the defendant, or something equivalent to it, by which the fraud is charged, is a substantive allegation, and must be proved; in the former, it is merely surplusage, and may be rejected.

(B) Evidence of Custom and Usage

COOPER v. KANE.

(Supreme Court of New York, 1838. 19 Wend. 386, 32 Am. Dec. 512.)

This was an action of replevin, tried at the Albany circuit in October, 1835, before the Hon. Hiram Denio, then one of the circuit judges.

The action was in the detinet for detaining a quantity of sand taken from a lot in the city of Albany belonging to the plaintiff, which the defendant had excavated under a contract with the plaintiff, so as to make the lot conform to a profile or plan of the streets established by the corporation. The contract was in writing; the defendant was to excavate the lot and make the necessary embankments within a limited time, for which he was to be paid by the plaintiff \$180, when the work was done. The defendant completed the job and was paid the stipulated price. Whilst engaged in the work, the defendant placed a large quantity of sand, which was taken off of the lot in order to make it conform to the required plan, on an adjoining lot not belonging to the plaintiff, and when requested by the plaintiff to permit her to take it away, he refused such permission; for this detention the action was brought. There was no stipulation in the contract as to whom the sand, taken from the lot in making the excavation, should belong after it was taken off the lot.

The defendant then offered to prove a custom of the city of Albany which had existed for a great number of years and was well known and understood, that in the excavation of lots, the material excavated belonged to the excavator and not to the owner of the lot, unless there was an express reservation in the contract to the contrary. The judge rejected the testimony, and instructed the jury, that on the evidence adduced the plaintiff was entitled to their verdict, who accordingly found a verdict for the plaintiff with six cents damages, and six cents costs, and assessed the value of the property at \$157. The defendant moves for a new trial. The cause was submitted on written arguments.

NELSON, C. J. I am inclined to the opinion that the evidence of the custom in respect to contracts like the one out of which this action has arisen, by way of explaining it, and which was offered by the defendant for that purpose, was admissible. It did not go to vary any express or necessarily implied stipulations between the parties therein contained, but rather to establish what amounted to a complete performance agreeably to the presumed understanding of the parties.

Mr. Starkie says (2 Starkie, Ev. 258, 259), "where parties have not entered into any express and specific contract, a presumption

nevertheless arises, that they meant to contract and to deal according to the general usage, practice and understanding, if any such exist, in relation to the subject matter." The same rule of evidence is also recognized by Phillipps (volume 1, pp. 420, 421), and Lord Kenyon remarked in *Whitnel v. Gratham*, 6 Term R. 393, that evidence of usage was admissible to expound a private deed, as well as the king's charter. The right of carriers, dyers, wharfingers, &c. to a lien on the goods entrusted to them for their compensation, is frequently established by usage, independently of the contract.

In *Rushforth v. Hadfield*, 6 East, 519, Lord Ellenborough permitted the defendants (common carriers) to go into proof of common usage to detain the goods for a general balance, on the ground of an implied agreement arising out of it between the parties. He observed that if there be a general usage of trade to deal with common carriers in this way, all persons dealing in the trade are supposed to contract with them upon the footing of the general practice, adopting the general lien into their contract. Lawrence, J., admitted that the lien must be by contract between the parties, but observed that usage of trade was evidence of the contract, and if so long established as to afford a presumption it was commonly known, it was fair to conclude the particular parties contracted with reference to it.

In *Kirkman v. Shawcross*, 6 Term R. 14, the dyers, dressers, whistlers, printers, &c., of a neighborhood, held a public meeting and entered into an agreement that they would receive no more goods in the way of their trade, except on the condition that they should have a lien on them for a general balance, which was extensively published. The court held that any person who delivered goods to them after notice must be deemed to have assented to the terms prescribed; and, as we have seen, notice might be inferred from the general notoriety of the terms thus published.

Now, in this case, there is simply an agreement to excavate the earth in a certain street and to make the necessary embankment, according to a map of the corporation, for a given compensation. Nothing is said about the surplus earth, where it is to be laid, or what is to be done with it. Would it be a workmanlike execution of the contract to pile it upon the adjacent bank? or may the contractor dispose of it as he sees fit, and as most convenient and profitable to himself? It appears to me, the solution of these questions may very well be referred to common usage in such cases, if any exist; and that if it should be proved as said by Lawrence, J., "It is fair to conclude the particular parties contracted with reference to it." This usage may often have a very important influence upon the minds of the parties as exemplified in this case: for the value of the materials, which the plaintiff has recovered, nearly equals the price of the job. If in fact the usage exists, and the contract was made in reference to it, serious injustice must be the result of upholding the verdict. New trial granted.

II. Rules of Construction *

1. IN GENERAL

PLANO MFG. CO. v. ELLIS.

(Supreme Court of Michigan, 1888. 68 Mich. 101, 35 N. W. 841.)

This is an action of assumpsit, commenced in the recorder's court of the city of Niles, Michigan, by summons issued September 26, 1885. Plaintiff declared, orally, on the common counts, in assumpsit and filed this bill of particulars: "Plaintiff's declaration: Common counts in assumpsit for the price and value of one Plano Manufacturing Co. binder sold and delivered to the defendant by the plaintiff for the sum of \$120." Defendant pleaded the general issue, with notice. The recorder rendered judgment for the defendant, and plaintiff appealed to the circuit court, Berrien county, where judgment was rendered for plaintiff. Defendant appealed.

CHAMPLIN, J. On the eighth day of July, 1885, the plaintiff, through its agents Harder & Haynes, entered into an agreement with defendant in writing, as follows:

"Niles, Michigan, July 8, 1885.

"We hereby agree to let Peter Ellis have the sample Plano binder, 1885, at same price that Mr. Ream has his for, and the binder is to do good work and give satisfaction; and, if not, the said Ellis is to pay for use of same.

Harder & Haynes.

"Peter Ellis."

Plaintiff, by its agents, delivered a Plano binder at defendant's farm, and set it up, and put it in operation. Defendant used it in cutting about 95 acres of grain, and claims that it did not do good work, and did not give to him satisfaction; and, on July 27, 1885, he served written notice on Harder & Haynes, as follows:

"Niles, Mich., July 27, 1885.

"Messrs. Harder & Haynes—Gentlemen: The sample Plano binder, that you let me have on trial, does not do good work, and does not give satisfaction. I am not satisfied with it. It is at my place, where you left it, subject to your order; you can come and take it. I am willing to pay for the use of the same, and hereby offer so to do.

"Yours, etc.,

Peter Ellis."

On the trial, testimony was offered to show how the machine worked. The defendant's counsel objected to its introduction, as being immaterial. The circuit judge overruled the objection, and admitted

* For discussion of principles, see Clark on Contracts (2d Ed.) §§ 218, 219-222.

the testimony, saying: "My opinion of the construction of this contract is this: that it is to be a satisfactory machine, not to him, but such as people knowing the quality of machines would be satisfied with; it is to do satisfactory work."

Under this ruling a large amount of testimony was received as to the working of the machine while in defendant's possession, and the circuit judge, construing the instrument, in his charge to the jury, instructed them as follows: "As I said in the outset, this word 'satisfaction' has no further significance than the fact that it should be a good machine, and do good, reasonable work, which would be satisfactory to intelligent, reasonable men using machinery." And again: "The question for you to determine is, was this machine capable, with proper management, of doing as good work as those that are called good, first-class machines, working through the country, under the same circumstances, and in the same kind of grain? Was it a good machine, and did it do good work, under proper management, and proper conditions; did it do that kind of work so it should have been satisfactory to a man of intelligence in relation to this kind of machines; did it do that? That is the question."

We are of opinion that the circuit court erred in the construction which he placed upon the contract. A cardinal axiom, in the construction of written contracts, is that all the parts must be examined, and effect given to every word and phrase, if practicable. *Vary v. Shea*, 36 Mich. 388; *Norris v. Showerman*, Walk. Ch. 206; *Id.*, 2 Doug. 16; *Paddock v. Pardee*, 1 Mich. 421; *Howell v. Richards*, 11 East, 643. The object is to arrive at the intention of the parties; and this is to be deduced from the language employed by them to express their intention. If the language employed is not free from doubt or uncertainty, resort may be had to the condition of the respective parties, the subject-matter of the contract, and the circumstances surrounding the transaction and connected with it, and everything except the contemporaneous and previous declarations of the parties, for the purpose of enabling the court to ascertain the intention of the parties. *Mills v. Spencer*, 3 Mich. 127, 136.

Applying the above principles of construction to the writing introduced as the basis of plaintiff's claim, it is clear that the binder was not only to do good work, but it was to give satisfaction to defendant. Unless he was satisfied with the machine, although it did good work, he was not bound to purchase. The construction placed on the instrument by the circuit judge completely nullify the words "and give satisfaction." He construed them as synonymous with, to do satisfactory work, such as people knowing the quality of machines would be satisfied with; or, to use his own language, "this word 'satisfaction' has no further significance than the fact that it should be a good machine, and do good, reasonable, work, which would be satisfactory to reasonable men using machinery."

This, certainly, is not the usual signification of the word, and there

is nothing in the context, or in the subject-matter, which indicates that the word was used in any other than its ordinary meaning. The vendor had already agreed that the binder should "do good work," and if the learned judge had defined that phrase in the same way he did the word "satisfaction," it would have been applicable and proper. No one can read this writing, and give to the words their ordinary meaning, without understanding that something more was required than that the binder should do good work before defendant was obliged to keep and pay for the machine. He was not obliged to do so unless, also, it gave satisfaction to him.

We may not take judicial notice of the fact, but we may well suppose that there is a choice between machines for reaping and binding that do good work. It may be that a machine which will do good, satisfactory work in reaping and binding, may, at the same time, have more side-draught than another, or it may be so geared as to require much more power to propel it than another, or its machinery may be complicated, and so constructed as to easily get out of repair, or require greater care and skill in operating it. All these things may not be impossible, or even improbable. How, then, can it be said that, although it does good work, nevertheless it may not give satisfaction? Or why should it be said, when the bargainer has reserved the right to elect whether he be fully pleased or not, that he is bound to be pleased if another reasonable or intelligent man is pleased with the work of such machine?

There is another clause in the contract which has a bearing upon the question. It is stipulated that if the machine does not do good work, and give satisfaction, the said Ellis is to pay for the use of the same. It cannot be contended, with reason, that Ellis agreed to pay for the use of a machine that did not do good work. This clause implies that it may do good work, and yet not give satisfaction so that he will be willing to keep and pay for it. He agreed that, if it did not do good work, and give satisfaction, he would pay for the use of the binder. He was entitled, under the agreement, to give the machine a thorough, practical trial; and then, if he was not satisfied with it, he was to pay for the use of it. This provision entitles the writing to a liberal construction in his favor. It shows that he had an option to accept or reject the binder, according as it gave him satisfaction or not.

A proper construction of the contract clearly brings it within the first class of such contracts referred to in *Machine Co. v. Smith*, 50 Mich. 565-569, 15 N. W. 906, 45 Am. Rep. 57, and is governed by the decision in that case. The judgment must be reversed and a new trial granted.

2. RULES AS TO TIME

BECK & PAULI LITHOGRAPHING CO. v. COLORADO MILL-
ING & ELEVATOR CO.

(Circuit Court of Appeals, Eighth Circuit, 1892. 52 Fed. 700, 3 C. C. A. 248.)

In error to the circuit court of the United States for the district of Colorado. Reversed.

Statement by SANBORN, Circuit Judge:

This was an action by the plaintiff in error to recover the contract price of certain stationery and advertising matter furnished the defendant. It was tried on the merits, and at the close of the evidence the court instructed the jury to return a verdict for the defendant, and this instruction is assigned as error.

The plaintiff was a corporation of Wisconsin, engaged in lithographing and printing, and its principal place of business was at Milwaukee, in that state. The defendant was a corporation of Colorado, engaged in the business of milling, and its principal place of business was at Denver, in that state. In June, 1889, the plaintiff agreed to make new designs of certain buildings of defendant, with sketches of its trade-marks; to execute engravings thereof in a strictly first-class style; to embody these on the stationery described below; to submit to defendant for approval proofs thereof; to submit designs and proofs of hangers, on fine chromo plate, for advertising defendant's business, by the following fall; to engrave a strictly first-class vignette of one of defendant's plants; to submit a sketch and proof thereof to defendant; to furnish defendant with 10,000 business cards and 5,000 checks in August, 1889; to furnish, in the course of the year, letter heads, note heads, bill heads, statements, bills, envelopes, and cards to the defendant to the number of 331,100, and 5,000 hangers; and to furnish the vignette and 5,000 hangers more after the approval of the proofs thereof by the defendant. The defendant agreed to take and pay for this stationery, this vignette, and these hangers at certain agreed prices, which amounted in the aggregate to about \$6,000. The plaintiff furnished the 10,000 cards and 5,000 checks required under the contract in August, 1889, and the defendant received and paid for them.

The plaintiff introduced testimony to the effect that it strictly complied with and fully performed these contracts in every respect, except that it shipped the articles contracted for (which were not delivered in August) by rail from Milwaukee to the defendant, at Denver, in December, 1889, in five boxes, four of which did not arrive at

Denver until 9:42 a. m., January 1, 1890, and the fifth did not arrive there until January 4, 1890; that before January 8, 1890, all of these articles were tendered to the defendant and it refused to examine or receive them; that the sketches and proofs of the designs, trademarks, and hangers had been submitted to and approved by the defendant during the summer and fall of 1889, before these articles were manufactured, and that the last proof was approved November 16, 1889; that on December 16, 1889, the defendant wrote the plaintiff to forward by express 2,000 statements and 3,000 envelopes "as per proofs submitted;" that the state of the art and process of lithographing is such that, after the general idea of a piece of work is conceived, it is customary to make first a pencil design, and, when this is found satisfactory, to prepare a colored sketch where colored work is required; that after the sketch is colored it is lithographed, that is, transferred to a stone; that each color requires a separate stone; and in these hangers there were nine colors; that it requires from two to three months to reproduce on stone a colored sketch like that used for the hangers; that the artists' work and the reproduction on stone were the most expensive parts of this work contracted for; and that the expense of the materials and printing was but a small part of the entire expense of the work.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge (after stating the facts). The ground on which it is sought to sustain the instruction of the court below to return a verdict for the defendant in this case is that the plaintiff failed to tender or deliver the articles contracted for to the defendant, at Denver, until six or eight days after the expiration of the year, that the plaintiff did not therefore furnish them "in the course of the year," and that this failure justified the defendant in repudiating the contract, and refusing to pay any part of the contract price.

It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations.

In the application of this principle to the cases as they have arisen, in the promulgation of the rules naturally deduced from it, and in the assignment of the various cases to the respective classes in which the stipulation as to time of performance is, or is not, deemed of the

essence of the contract, the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust penalties may not be inflicted, nor unreasonable damages recovered. Thus, in the ordinary contract of merchants for the sale and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. *Norrington v. Wright*, 115 U. S. 188-203, 6 Sup. Ct. 12, 29 L. Ed. 366.

This application of the general principle commends itself as just and reasonable, on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods.

On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit \$1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation when the house was completed shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. *Tayloe v. Sandiford*, 7 Wheat. 13, 17, 5 L. Ed. 384.

This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one.

The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. *Norrington v. Wright*, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366; *Rolling Mill v. Rhodes*, 121 U. S. 255, 261, 7 Sup. Ct. 882,

30 L. Ed. 920. But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. *Taylor v. Sandiford*, 7 Wheat. 13, 17, 5 L. Ed. 384; *Hambly v. Railroad Co.* (C. C.) 21 Fed. 541, 544, 554, 557.

It only remains to determine whether the contracts in the case at bar are the ordinary contracts of merchants for the manufacture and sale of marketable commodities or contracts for labor, skill, and materials, and this is not a difficult task. A contract to manufacture and furnish articles for the especial, exclusive, and peculiar use of another, with special features which he requires, and which render them of value to him, but useless and unsalable to others,—articles whose chief cost and value are derived from the labor and skill bestowed upon them, and not from the materials of which they are made,—is a contract for work and labor, and not a contract of sale. *Engraving Co. v. Moore*, 75 Wis. 170, 172, 43 N. W. 1124, 6 L. R. A. 788, 17 Am. St. Rep. 186; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Hinds v. Kellogg* (Com. Pl.) 13 N. Y. Supp. 922; *Turner v. Mason*, 65 Mich. 662, 32 N. W. 846.

Thus in *Engraving Co. v. Moore*, *supra*, where the lithographing company had contracted to manufacture a large quantity of engravings and lithographs for a theatrical manager, with special features, useful to him only during a certain season, and they were completed and set aside in the rooms of the lithographer, and there burned before delivery to the manager, the court held that the contract was not one for the sale of personal property, but one for work, skill, and materials, because it was not the materials, but the lithographer's work of skill, that gave the value to the finished advertisements, and was the actual subject-matter of the contract, and because that work and skill, while it added the chief value to the finished articles for the especial use of the defendant, made both the articles and the materials worthless for all other purposes.

The contracts in the case we are considering were not for the blank paper on which they were finally impressed; that was of small value in proportion to the value of the finished articles; they were not for the sale of anything then in existence; they were for the artistic skill and labor of the employés of the defendant in preparing the sketches and designs, transferring them upon stone, and finally impressing them upon the paper the defendant was to furnish; and they authorized the plaintiff, without other orders than the contracts themselves, and the approvals of the designs and proofs there called for, to prepare and furnish all the articles named in the contracts and

to collect the contract price therefor. These contracts required the names of defendant's mills and its trade-marks to be so impressed upon all these articles that when they were completed they were not only unsalable to all others, but worthless to plaintiff for all purposes but waste paper.

The contracts are evidence that on December 31, 1889, the articles contracted for would have been worth about \$6,000 to the defendant, and if a few days later, when they were tendered, they were not worth so much, the defendant may recover the damages it suffered from the delay from December 31, 1889, to the date of the tender, in a proper action therefor, or may have the same allowed in this action under proper pleadings and proofs, and no injustice will result; while, if the defendant was permitted on account of this delay to utterly repudiate the contract, the plaintiff must practically lose the entire \$6,000. The contracts contain no stipulation from which it can be fairly inferred that the parties intended the time of performance to be even material; indeed, they strongly indicate the contrary. They provide that a certain portion of the articles shall be furnished in two months, that the remainder of the stationery and 5,000 hangers shall be furnished in the course of the year, and that 5,000 hangers more and the vignette shall be furnished within a reasonable time after the proofs are approved by the defendant; there is no stipulation for the payment of any damages or the avoidance of the contracts on account of a failure to perform within any of the times stipulated in the contracts, and the parties themselves proceeded so leisurely thereunder that the first and only admitted request by the defendant for the delivery of any of the articles not delivered in August was on December 16, 1889. In *Tayloe v. Sandiford*, *supra*, the court refused to permit the owner to retain the \$1,000 which the house builder had expressly agreed to pay if he failed to complete the house within the time fixed in the contract. In the absence of any such stipulation, or any clearly-expressed intent that time should be material even, it would be clearly unjustified by the law and inequitable to hold that the plaintiff is compelled to forfeit his entire contract price on account of this trifling delay that may have been immaterial to the defendant, and, if not, may be fully compensated in damages.

The result is that these contracts were not for the sale and delivery, or the manufacture and delivery, of marketable commodities. They were contracts for artistic skill and labor, and the materials on which they were to be bestowed in the manufacture of articles which were not salable to any one but the defendant when completed because impressed with special features useful only to it. There was nothing in the contracts or their subject-matter indicating any intention of the parties that the stipulations as to time should be deemed of their essence; and the defendant was not justified on account of the slight delay disclosed by the record in refusing to accept the goods, or in repudiating the entire contract.

This conclusion disposes of the case, and it is unnecessary to notice other errors assigned. The judgment below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

3. RULES AS TO PENALTIES AND LIQUIDATED DAMAGES

JAQUITH v. HUDSON.

(Supreme Court of Michigan, 1858. 5 Mich. 123.)

The action was by Jaquith against Hudson, upon a promissory note for one thousand dollars, given by the latter to the former, April 15th, 1855, and payable twelve months after date. Defendant pleaded the general issue, and gave notice that on the trial he would prove that, previous to said 15th day of April, 1855, plaintiff and defendant had been and were partners in trade, at Trenton, in said county of Wayne, under the name of Hudson & Jaquith; that, on that day the copartnership was dissolved, and the parties then entered into an agreement, of which the following is a copy:

"This article of agreement, made and entered into between Austin E. Jaquith, of Trenton, Wayne county, and state of Michigan, of the first part, and Jonathan Hudson, of Trenton, county of Wayne, and state of Michigan of the second part, witnesseth, that the said Austin E. Jaquith agrees to sell, and by these presents does sell and convey unto the said Jonathan Hudson, his heirs and assigns, all his right, title, and interest in the stock of goods now owned by the firm of Hudson & Jaquith, together with all the notes, books, book accounts, moneys, deposits, debts, dues, and demands, as well as all assets that in anywise belong to the said firm of Hudson & Jaquith; and that the copartnership that has existed between the said firm of Hudson & Jaquith is hereby dissolved; and that the said Austin E. Jaquith, by these presents, agrees that he will not engage in the mercantile business, in Trenton, for himself, or in connection with any other one, for the space of three years from this date, upon the forfeiture of the sum of one thousand dollars, to be collected by the said Hudson as his damages.

"In consideration whereof, the said Jonathan Hudson, of the second part, agrees for himself, his heirs and administrators, to pay unto the said Austin E. Jaquith the sum of nine hundred dollars, for his services in the firm of Hudson & Jaquith, together with all the money that he (the said Austin E. Jaquith) paid into said firm, deducting

therefrom the amount which he (the said Austin E. Jaquith) has drawn from said firm; the remainder the said Hudson agrees to pay to the said Jaquith, his heirs or assigns, at a time and in a manner as shall be specified in a note bearing even date with these presents. And the said Hudson, for himself, his heirs and assigns, agrees to pay all the debts, notes and liabilities of the firm of Hudson & Jaquith, and to execute unto the said Jaquith a good and sufficient bond of indemnification against all claims, debts, or liabilities of the firm of Hudson & Jaquith.

"Trenton, April, 1855.

Austin E. Jaquith. [L. S.]

"Jonathan Hudson. [L. S.]

"Witness: Arthur Edwards. Arthur Edwards, Jr."

And defendant further gave notice, among other things, that he would show, on the trial, that, after the execution of said agreement in writing, and the giving of said note in pursuance thereof, on or about the 15th day of July, 1855, plaintiff, in violation of said agreement, entered into the mercantile business at Trenton, and had continued to carry on the same ever since; by means whereof the consideration of said note had failed. And he further gave notice, that he (the defendant) continued to carry on the mercantile business at Trenton, after the dissolution of said copartnership; and by means of the breach of said articles by plaintiff, defendant had sustained damages to the sum of one thousand dollars, liquidated by said articles for a breach thereof, which sum he would claim to have deducted from the amount of said note, on the trial. * * *

The court was then asked by plaintiff's counsel to charge the jury, as follows: * * * "2. That, even if the agreement set up was, in the opinion of the jury, properly delivered, as between the parties, the defendant can not recoup any damages against the plaintiff, except upon evidence showing that some damage was actually sustained by him; that the clause in the agreement as to damages, can not, of itself, and in the absence of evidence, operate to the reduction of the claim of the plaintiff, as the sum fixed in the agreement is in the nature of a penalty, and not liquidated damages; and no damages can be recovered under it except such as are proven." The court refused so to charge; and plaintiff excepted. * * *

The court charged the jury, that it was not necessary for the defendant to prove any actual damage under the plaintiff's breach of the said agreement, as the damages therein fixed were liquidated damages, and not a penalty.

The issue was then submitted to the jury on the evidence, who found a verdict for the plaintiff, in the sum of eighteen dollars and eight cents, allowing the defendant the sum of one thousand dollars mentioned in the agreement.

Plaintiff brought the case to this court, by writ of error, accompanied by bill of exceptions.

CHRISTIANCY, J.⁴ * * * The second exception raises the single question, whether the sum of \$1,000, mentioned in the covenant of Jaquith not to go into business in Trenton, is to be construed as a penalty, or as stipulated damages—the plaintiff in error insisting it should be construed as the former, the defendant as the latter.

We shall not attempt here to analyze all the decided cases upon the subject, which were read and cited upon the argument, and which, with others, have been examined. It is not to be denied that there is some conflict, and more confusion, in the cases; judges have been long and constantly complaining of the confusion and want of harmony in the decisions upon this subject. But, while no one can fail to discover a very great amount of apparent conflict, still it will be found, on examination, that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case. And while there are some isolated cases (and they are but few), which seem to rest upon no very intelligible principle, it will be found, we think, that the following general principles may be confidently said to result from, and to reconcile, the great majority of the cases, both in England and in this country:

First. The law, following the dictates of equity and natural justice, in cases of this kind, adopts the principle of just compensation for the loss of injury actually sustained; considering it no greater violation of this principle to confine the injured party to the recovery of less, than to enable him, by the aid of the court to extort more. It is the application, in a court of law, of that principle long recognized in courts of equity, which, disregarding the penalty of the bond, gives only the damages actually sustained. This principle may be stated, in other words, to be, that courts of justice will not recognize or enforce a contract, or any stipulation of a contract, clearly unjust and unconscionable; a principle of common sense and common honesty so obviously in accordance with the dictates of justice and sound policy as to make it rather matter of surprise that courts of law had not always, and in all cases, adopted it to the same extent as courts of equity. And, happily for the purposes of justice, the tendency of courts of law seems now to be towards the full recognition of the principle, in all cases.

This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the law of the contract; and they will not permit the parties by express stipulation, or any form of language, however clear the intent, to set it aside; on the familiar ground, "*conventus privatorum non potest publico juri derogare.*"

But the court will apply this principle, and disregard the express stipulation of parties, only in those cases where it is obvious from

⁴ The statement of facts is abridged, and a portion of the opinion is omitted.

the contract before them, and the whole subject-matter, that the principle of compensation has been disregarded, and that to carry out the express stipulation of the parties, would violate this principle, which alone the court recognizes as the law of the contract.

The violation, or disregard, of this principle of compensation, may appear to the court in various ways—from the contract, the sum mentioned, and the subject-matter. Thus, where a large sum (say one thousand dollars) is made payable solely in consequence of the non-payment of a much smaller sum (say one hundred dollars), at a certain day; or where the contract is for the performance of several stipulations of very different degrees of importance, and one large sum is payable on the breach of any one of them, even the most trivial, the damages for which can, in no reasonable probability, amount to that sum; in the first case, the court must see that the real damage is readily computed, and that the principle of compensation has been overlooked, or purposely disregarded; in the second case, though there may be more difficulty in ascertaining the precise amount of damage, yet, as the contract exacts the same large sum for the breach of a trivial or comparatively unimportant stipulation, as for that of the most important, or of all of them together, it is equally clear that the parties have wholly departed from the idea of just compensation, and attempted to fix a rule of damages which the law will not recognize or enforce.

We do not mean to say that the principle above stated as deducible from the cases, is to be found generally announced in express terms, in the language of the courts; but it will be found, we think, to be necessarily implied in, and to form the only rational foundation for, all that large class of cases which have held the sum to be in the nature of a penalty, notwithstanding the strongest and most explicit declarations of the parties that it was intended as stipulated and ascertained damages.

It is true, the courts in nearly all these cases profess to be construing the contract with reference to the intention of the parties, as if for the purpose of ascertaining and giving effect to that intention; yet it is obvious, from these cases, that wherever it has appeared to the court, from the face of the contract and the subject-matter, that the sum was clearly too large for just compensation, here, while they will allow any form of words, even those expressing the direct contrary, to indicate the intent to make it a penalty, yet no form of words, no force of language, is competent to the expression of the opposite intent. Here, then, is an intention incapable of expression in words; and as all written contracts must be expressed in words, it would seem to be a mere waste of time and effort to look for such an intention in such a contract. And as the question is between two opposite intents only, and the negation of the one necessarily implies the existence of the other, there would seem to be no room left for construction with reference to the intent. It must, then, be manifest

that the intention of the parties in such cases is not the governing consideration.

But some of the cases attempt to justify this mode of construing the contract with reference to the intent, by declaring, in substance, that though the language is the strongest which could be used to evince the intention in favor of stipulated damages, still, if it appear clearly, by reference to the subject-matter, that the parties have made the stipulation without reference to the principle of just compensation, and so excessive as to be out of all proportion to the actual damage, the court must hold that they could not have intended it as stipulated damages, though they have so expressly declared. See, as an example of this class of cases, *Kemble v. Farren*, 6 Bing. 141.

Now this, it is true, may lead to the same result in the particular case, as to have placed the decision upon the true ground, viz., that though the parties actually intended the sum to be paid, as the damages agreed upon between them, yet it being clearly unconscionable, the court would disregard the intention, and refuse to enforce the stipulation. But, as a rule of construction, or interpretation of contracts, it is radically vicious, and tends to a confusion of ideas in the construction of contracts generally. It is this, more than anything else, which has produced so much apparent conflict in the decisions upon this whole subject of penalty and stipulated damages. It sets at defiance all rules of interpretation, by denying the intention of the parties to be what they, in the most unambiguous terms, have declared it to be, and finds an intention directly opposite to that which is clearly expressed—"divinatio, non interpretatio est, quæ omnino recedit a literâ."

Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked, whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what in its own nature is but a penalty.

The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties can not alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now in-

tend the payment of stipulated damages; it must, therefore, we think, be very obvious that the actual intention of the parties, in this class of cases, and relating to this point, is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and can not be made, the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say "that the parties must be considered as not meaning exactly what they say." *Homer v. Flintoff*, 9 Mees. & W., per Park, B. May it not be said, with at least equal propriety, that the courts have sometimes said what they did not exactly mean?

The foregoing remarks are all to be confined to that class of cases where it was clear, from the sum mentioned and the subject-matter, that the principle of compensation had been disregarded.

But, secondly, there are great numbers of cases, where, from the nature of the contract and the subject-matter of the stipulation, for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them. In all such cases, the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach. In permitting this, the law does not lose sight of the principle of compensation, which is the law of the contract, but merely adopts the computation or estimate of the damages made by the parties, as being the best and most certain mode of ascertaining the actual damage, or what sum will amount to a just compensation. The reason, therefore, for allowing the parties to ascertain for themselves the damages in this class of cases, is the same which denies the right in the former class of cases; viz., the courts adopt the best and most practicable mode of ascertaining the sum which will produce just compensation.

In this class of cases where the law permits the parties to ascertain and fix the amount of damages in the contract, the first inquiry obviously is, whether they have done so in fact? And here, the intention of the parties is the governing consideration; and in ascertaining this intention, no merely technical effect will be given to the particular words relating to the sum, but the entire contract, the subject-matter, and often the situation of the parties with respect to each other and to the subject-matter, will be considered. Thus though the word "penalty" be used (*Sainter v. Ferguson*, 7 Man., G. & S. 716; *Jones v. Green*, 3 Younge & J. 299; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102), or "forfeit" (*Nobles v. Bates*, 7 Cow. [N. Y.] 307),

or "forfeit and pay" (Fletcher v. Dycke, 2 Term R. 32), it will still be held to be stipulated damages, if, from the whole contract, the subject-matter, and situation of the parties, it can be gathered that such was their intention. And in proportion as the difficulty of ascertaining the actual damage by proof is greater or less, where this difficulty grows out of the nature of such damages, in the like proportion is the presumption more or less strong that the parties intended to fix the amount.

It remains only to apply these principles to the case before us. It is contended by the plaintiff in error, that the payment of the one thousand dollars mentioned in the covenant of Jaquith is not made dependent solely upon the breach of the stipulation not to go into business in Trenton, but that it applies equally—First, to the agreement to sell to Hudson his interest in the goods; second, to sell his interest in the books, notes, accounts, etc.; and, third, to the agreement to dissolve the partnership. But we can perceive no ground for such a construction. The language in reference to the sale of the interest in the goods, books, notes, accounts, etc., and that in reference to the dissolution, is not that of a sale in futuro, nor for the dissolution of the partnership at a future period, but it is that of a present sale and a present dissolution—"does hereby sell," and "the copartnership is hereby dissolved," is the language of the instrument.

It is plain, from this language, from the subject-matter, and from all the acts of the parties, that these provisions were to take, and did take, immediate effect. There could be no possible occasion to provide any penalty or stipulated damages for the non-performance of these stipulations, because this sale and dissolution would already have been accomplished the moment the contract took effect for any purpose; and, until it took effect, the stipulation for the one thousand dollars could not take effect or afford any security, nor would Hudson be bound or need the security. But it remained to provide for the future. If Jaquith were to be at liberty to set up a rival store in the same village, it might seriously affect the success of Hudson's business; and we are bound to infer, from the whole scope of this contract, that Hudson would never have agreed to pay the consideration mentioned in it, nor to have entered into the contract at all, but for the stipulation of Jaquith "that he will not engage in the mercantile business in Trenton, for himself or in connection with any other one, for the space of three years from this date, upon the forfeiture of the sum of one thousand dollars, to be collected by said Hudson as his damages." This stipulation of Jaquith not to go into business, is the only one on his part which looks to the future; and it is to this, alone, that the language in reference to the one thousand dollars applies. Any other construction would do violence to the language, and be at war with the whole subject matter.

The damages to arise from the breach of this covenant, from the nature of the case, must be not only uncertain in their nature, but

impossible to be exhibited in proof, with any reasonable degree of accuracy, by any evidence which could possibly be adduced. It is easy to see that while the damages might be very heavy, it would be very difficult clearly to prove any. Their nature and amount could be better estimated by the parties themselves, than by witnesses, courts, or juries. It is, then, precisely one of that class of cases in which it has always been recognized as peculiarly appropriate for the parties to fix and agree upon the damages for themselves. In such a case, the language must be very clear to the contrary, to overcome the inference of intent (so to fix them), to be drawn from the subject-matter and the situation of the parties; because, it is difficult to suppose, in such a case, that the party taking the stipulation intended it only to cover the amount of damages actually to be proved, as he would be entitled to the latter without the mention of any sum in the contract, and he must also be supposed to know that his actual damages, from the nature of the case, are not susceptible of legal proof to anything approaching their actual extent.

That the parties actually intended, in this case, to fix the amount to be recovered, is clear from the language itself, without the aid of a reference to the subject-matter, "upon the forfeiture of the sum of one thousand dollars, to be collected by the said Hudson as his damages." It is manifest from this language that it was intended Hudson should "collect," or, in other words, receive this amount, and that it should be for his damages for the breach of the stipulation. This language is stronger than "forfeit and pay," or "under the penalty of," as these might be supposed to have reference to the form of the penal part of a bond, or to the form of action upon it, and not to the actual "collection" of the money.

It is, therefore, very clear, from every view we have been able to take of this case, that it was competent and proper for the parties to ascertain and fix for themselves the amount of damages for the breach complained of, and equally clear that they have done so in fact. From the uncertain nature of the damages, we cannot say that the sum in this case exceeds the actual damages, or that the principle of compensation has been violated. Indeed, it would have been perhaps difficult to discover a violation of this principle had the sum in this case been more than it now is, though, doubtless, even in such cases as the present, if the sum stated were so excessive as clearly to exceed all reasonable apprehension of actual loss or injury for the breach, we should be compelled to disregard the intention of the parties, and treat the sum only as a penalty to cover the actual damages to be exhibited in proof. In this case the party must be held to the amount stipulated in his contract.

The second exception, therefore, is not well taken; the court properly refused to charge as requested, and no error appearing in the record, the judgment of the circuit court for the county of Wayne must be affirmed. The other justices concurred.

DISCHARGE OF CONTRACT

I. Discharge of Contract by Agreement¹

1. WAIVER, CANCELLATION, OR RESCISSION

KELLETT v. ROBIE.

(Supreme Court of Wisconsin. 1898. 99 Wis. 303, 74 N. W. 781.)

Action by Harriet Kellett against Fred H. Robie. Judgment for plaintiff. Defendant appeals.

WINSLOW, J. This is an action for breach of promise of marriage, and the plaintiff has obtained a judgment for damages fixed at \$3,500. The contract of marriage was admitted, but the defendant claimed that there was a subsequent mutual release. This was denied by the plaintiff, and upon this issue the case was tried.

The evidence showed that the parties became engaged August 30, 1890, the plaintiff then being twenty years of age; and it was agreed that the marriage should not take place for three years. The parties were farmers' children, and lived with their parents in adjoining towns in Winnebago county, about a mile and a half from each other. After the engagement, the defendant frequently called upon the plaintiff until December 17, 1893, at which time the defendant claims that the plaintiff suggested to him that, as long as his (defendant's) people were opposed to the match, they should separate, and call the engagement off, and that he assented to this proposition. The defendant never called on the plaintiff after this time, although they had some correspondence, which is in the record. Soon after this alleged conversation, the defendant commenced to call upon another young lady in the neighborhood, and continued to pay attention to her without objection on the part of the plaintiff, until he was married to her in December, 1895.

The plaintiff denied positively that she released the defendant from the engagement. In the course of her examination as a party under section 4096, Rev. St., she admitted that they had a conversation in December, 1893, in which she says, "I told him if he did not want to marry me of course he could suit himself; but he said he was marrying me, not his people, and he came to see me just the same." The evidence showed that the defendant was worth about \$6,000, composed of his interest in the estates of his father and grandfather, both of which were still unsettled.

¹ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 227-230, 232.

Several exceptions to rulings upon evidence and to the charge of the court were argued by the appellant, but, as we do not think we should be compelled to reverse the judgment on account of them alone, we shall not discuss them, but proceed to the main question, namely, whether the verdict is contrary to the evidence. Upon this question, after careful consideration of all the evidence, and especially of the letters written by the plaintiff after the alleged release, we can come to no conclusion except that the verdict is clearly against the preponderance of the evidence. These letters demonstrate to a certainty that something of a serious nature had interrupted the relations of the parties about the time that the defendant alleges the release took place. No explanation as to what this serious event was is offered except the defendant's explanation of a release.

We shall not give the letters in full, but content ourselves with some extracts, which seem to conclusively establish that the former relationship was broken off, and that marriage was no longer contemplated.

In a letter of January 21, 1894, she says: "Fred: If you desire a change, why take it, and end the matter right here. As I said previously, I cannot count second. I am glad of one thing; if we do separate forever you can always think that I performed my duty by you from the very first to the last."

On March 1, 1894, she wrote: "Fred: You may think it queer on my part in asking you to come and see me, after what has happened. I would never do so if it were not absolutely necessary, Fred; that you know. I know it will cause hard feelings, but I cannot help it. You must know, and the sooner the better. So let me see you as soon as possible. If I have done wrong in writing, please forgive me, Fred; it is for your and my welfare."

On March 8, 1894, she wrote again: "I just want you to come just once, and risk everything to oblige me. Your trouble is as nothing compared to mine. I knew you were in town Monday. I seen your horse, and some way I felt you were there. I don't feel hard toward you one bit, Fred. You will find me just the same. I am not fickle; once is forever with me; so don't feel bad about nothing. You shall never suffer through me again. I hope the day may come when you forget that you ever knew me. * * * Now, Fred, if you don't want to come, and if you think you will be happier by staying away, why I will try and bear it."

When the plaintiff said to the defendant in her letter of January 21st, "If you desire a change, take it, and end the matter right here," we can see no escape from the conclusion that it was an offer of freedom from the engagement; and when it further appears that the defendant acted upon this or a similar offer, and, without objection from the plaintiff, but with her knowledge, courted and married another woman, it must be considered that the offer was accepted and that the plaintiff has become bound by the offer and its acceptance. We

are unable to understand how, in the face of this evidence, the jury could have found that there was not a mutual release of the engagement.

In connection with this unaccountable verdict, we cannot refrain from saying that the damages awarded are grossly excessive, and that we should feel obliged to reverse upon this ground in any event. The defendant's estate amounted to about \$6,000, and there are no circumstances of aggravation in the case. The defendant is now married, and to give considerably more than half of his property as damages upon the facts appearing here, even if there had been no express release, we regard as out of the bounds of reason. The damages are so far excessive as to show passion, if not perversity, on the part of the jury.

Judgment reversed, and action remanded for a new trial.

2. SUBSTITUTED CONTRACT

McKENZIE et al. v. HARRISON et al

(Court of Appeals of New York. 1890. 120 N. Y. 260, 24 N. E. 458,
8 L. R. A. 257, 17 Am. St. Rep. 638.)

HAIGHT, J. This action was brought to recover the amount of rent alleged to be due and unpaid upon a lease of real estate in the city of New York. It appears that the parties had made and executed a lease under seal whereby the plaintiffs leased to the defendants the store and premises known as "No. 16 Fourth Street," for the term of 10 years from May 1, 1877, for the annual rental of \$4,500, payable quarterly. Upon the trial the defendants offered to prove, in substance, that after they had occupied the premises for one year under the lease, and paid the rent in full for that year, they reported to the plaintiffs that their business was very dull, and that they could not afford to pay so much rent; that thereupon the plaintiffs agreed to reduce the rent \$1,000 per year, making \$3,500 a year, or \$875 for each quarter; that thereafter the defendants, at the end of each quarter, paid the plaintiffs \$875, and the plaintiffs executed and delivered to them a receipt for that amount, in full for balance of rent due at that date as per agreement, "until times are better;" that this continued for three years, after which the plaintiffs notified the defendants that thereafter they wished them to pay the amount of rent originally provided for by the lease, and that thereafter the full amount of rent was paid until the commencement of this action, in December,

1886. This evidence was excluded by the trial court, and a verdict ordered for the plaintiffs for the full amount claimed.

The general term was of the opinion that the case of *Coe v. Hobby*, 7 Hun, 157; *Id.*, 72 N. Y. 141, 28 Am. Rep. 120, disposed of the questions involved in this case. The facts in that case are very similar to those which were offered to be proved in this, but in that case the action was brought for a quarter's rent which had become due, no part of which had been paid, the lessor refusing to any longer accept the reduced amount agreed upon; and he did not seek or claim the right to recover the balance of the quarterly rents, which had previously been paid in part under the agreement, and for which a receipt had been given in full. The distinction, therefore, between the two cases is apparent. In that case the lessor was seeking to enforce the provisions of his lease, which was under seal, and collect a quarter's rent then due and owing. The lessees were defending under an executory verbal contract to reduce the rent; while in this case the lessees are defending under an executed oral agreement to the effect that the rent has been paid and accepted in full, and is evidenced by a written receipt given therefor.

We shall not question the rule that a contract or covenant under seal cannot be modified by a parol unexecuted contract. *Coe v. Hobby*, *supra*; *Smith v. Kerr*, 33 Hun, 567-571; *Id.*, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362. Neither shall we question the views of the court below to the effect that the alleged oral agreement in this case to reduce the rent \$1,000 per year was void and inoperative in so far as it remained unexecuted. The lessors had the right to repudiate it at any time, and demand the full amount of rent provided for by the lease; but, in so far as the oral agreement had become executed, as to the payments which had fallen due and had been paid and accepted in full as per the oral agreement, we think the rule invoked has no application.

The reason of the rule was founded upon public policy. It was not regarded as safe or prudent to permit the contract of parties which had been carefully reduced to writing, and executed under seal, to be modified or changed by the testimony of witnesses as to the parol statements or agreements of parties. Hence the rule that testimony of parol agreements shall not be competent as evidence to impeach, vary, or modify written agreements or covenants under seal. But the parties may waive this rule, and carry out and perform the agreements under seal, as changed or modified by the parol agreement, thus executing both agreements; and where this has been done, and the parties have settled with a full knowledge of the facts and in the absence of fraud, there is no power to revoke or remedy reserved to either party. *Munroe v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; *Lattimore v. Harsen*, 14 Johns. 330; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793.

So, in this case, if, as is claimed, the parol agreement was made to

reduce the rent \$1,000 per year, and that agreement has been carried out and fully executed by the parties, and at the end of each quarter, when the rent by the terms of the lease became due and payable, the reduced sum, as agreed upon by the parol agreement, was paid, and the parties settled upon that basis, and, as evidence of such settlement, the plaintiffs gave a receipt in full for the amount of rent due to that date, it became executed, and the plaintiffs cannot revoke the same, or maintain this action to recover any greater sum than that settled for.

It is also claimed that the oral agreement was void for the want of a consideration. Assume this to be so, and that the plaintiffs at any time while the agreement remained executory had the right to demand the full amount of rent provided for by the lease. They, however, had the right to waive consideration, and carry out their parol agreement, and if they did this before executing it they were brought within the rule to which we have already called attention. To illustrate: A. may give B. his promissory note without consideration. As long as it remains in the hands of B., A. may interpose the defense that it was given for B.'s accommodation, and was without consideration. But as soon as A. executed his promise to B. by paying the note his agreement becomes executed, and he cannot recover back the money so paid.

It may be claimed that the payment of a less sum than the admitted debt is not a good accord and satisfaction. There are numerous authorities sustaining this doctrine. Lord Coke stated the rule to be that, where the condition is for the payment of a definite, fixed, liquidated sum, the obligor cannot at the time appointed pay a less sum in satisfaction of the whole, because it is apparent that the lesser sum of money cannot be a satisfaction of a greater. This rule has been criticised as unsound and unjust in cases where the lesser sum is accepted in full satisfaction of the greater, (see *Co. Litt.* 212b; *Foakes v. Beer*, 9 L. R. App. Cas. 605-617; *Jaffray v. Davis*, 48 Hun, 500, 1 N. Y. Supp. 814;) while, in other cases, the courts have gone still further, and held that the rule applied even in cases where the payment was accepted in full satisfaction, and a receipt given therefor. *Harriman v. Harriman*, 12 Gray (Mass.) 341; *Smith v. Phillips*, 77 Va. 548; *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep. 546; *Wilkinson v. Myers*, Langd. Cas. Cont. 197-201.

Under the view taken by us of this case, it does not become necessary to approve or disapprove of the doctrine promulgated in these cases, for this rule has no application when the payment is made under an agreement which is recognized as valid by the parties, and has been fully executed. Again, a debt could be discharged at common law by executing a formal release under seal. The seal imported a consideration, and this has not been questioned by any of the cases. There undoubtedly is a distinction between releases under seal and an ordinary receipt given on the payment of a sum of money which

is not under seal, the latter being subject to explanation and proof showing that it was given without consideration. But, even though there may not be an accord and satisfaction, there may be a gift, and the receipt may be evidence of such gift.

A gift is a voluntary transfer of any property or thing by one to another without consideration. To be valid, it must be executed. There must be a delivery by the donor such as will place the property or thing given under the control of the donee, and there must be an intent to vest the title in him. Actual and personal delivery by the donor is not always necessary, for, when another person is the custodian, an order of the donor to deliver to the donee may constitute a gift. It may be oral or in writing. No formal words or expressions are required. It is a question of intent, and the inquiry is as to what was intended by that which was said and done. A promissory note or other evidence of debt may be the subject of a gift, and the delivery of the note or of the evidence of debt is evidence tending to show an intent to give. A debt may be forgiven, and a receipt in full may be evidence of such forgiveness. 2 Schouler, Pers. Prop. §§ 68-90. See, also, Bish. Cont. § 50.

In the case of *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181, the defendant was owing the plaintiff the sum of \$820. The plaintiff told him that if he would give him one dollar to make it lawful he would give him the entire debt. Whereupon the defendant delivered one dollar to the plaintiff, who thereupon executed and delivered a receipt therefor in full to balance all accounts to date, of whatever name and nature. It was held that the executing and delivery of the receipt in full, with the purpose of giving the debt, was such an act that the law would construe the instrument, if necessary, as an assignment to the defendant. This case is in point, and is controlling upon the question under consideration. See *Ferry v. Stephens*, 66 N. Y. 321; *Carpenter v. Soule*, 88 N. Y. 251-256, 42 Am. Rep. 248.

We are therefore of the opinion that the proof offered should have been received, that from it the jury might have found that the plaintiffs gave to the defendant the balance of the rent for which this action was brought. The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur, except FOLLETT, C. J., and BRADLEY and PARKER, JJ., who dissent.

3. OCCURRENCE OF CONDITION SUBSEQUENT.

RAY v. THOMPSON.

(Supreme Judicial Court of Massachusetts, 1853. 12 Cush. 281.
59 Am. Dec. 187.)

Assumpsit for the price of a horse sold to the defendant. The defence was that the horse was sold under a conditional contract, with a right to return him within a specified time, if not satisfactory to the defendant, and that the defendant did so return him. At the trial in the court of common pleas before Mellen, J., the plaintiff offered evidence tending to prove that during the time limited by the contract for the return of the horse, and while he was in the defendant's possession, the defendant misused and abused the horse, whereby he was materially injured and lessened in value, and that the plaintiff did not accept him in return; which evidence, the presiding judge, on objection by the defendant, rejected, and, the verdict being for the defendant, the plaintiff alleged exceptions to the ruling.

PER CURIAM. The evidence offered by the plaintiff ought to have been admitted, to prove, if he could, that the horse had been abused and injured by the defendant, and so to show that the defendant had put it out of his power to comply with the condition, by returning the horse. The sale was on a condition subsequent; that is, on condition he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant, in the meantime, disabled himself from performing the condition,—and if the horse was substantially injured by the defendant by such abuse, he would be so disabled,—then the sale became absolute, the obligation to pay the price became unconditional, and the plaintiff might declare as upon an indebitatus assumpsit, without setting out the conditional contract. *Moss v. Sweet*, 3 Eng. Law & Eq. 311, 16 Adol. & E. 493.

New trial ordered.

THROCKM. CONT.—24

II. Discharge of Contract by Performance²

1. IN GENERAL

PENNINGTON v. HOWLAND.

(Supreme Court of Rhode Island, 1898. 21 R. I. 65, 41 Atl. 891,
79 Am. St. Rep. 774.)

Action by Harper Pennington against Samuel S. Howland. There was a verdict for plaintiff.

STINESS, J. The plaintiff was employed to paint a pastel portrait of the defendant's wife for the sum of \$500, under a contract by correspondence, which only provided for the price. The plaintiff went to the defendant's house, in Washington, D. C., and began his work. The defendant testified that he at once objected to the proposed portrait, in street dress and hat; but the plaintiff said it was an artistic idea, which he wished to carry out, and that, if it was not satisfactory, he would paint the defendant one "until satisfied." He also testified that the plaintiff undertook the commission with the understanding that he would paint a satisfactory portrait. The plaintiff denies this, and says that, upon the completion of his work, Mrs. Howland said that she wanted another portrait, taken in a different style of dress, to show a pearl necklace which had belonged to her mother. He then painted a second portrait, and went away, leaving his implements, as he says, to be sent to him, or, as the defendant says, because the portrait was not finished, and because he was to return to complete it. The defendant says that he received a letter from the plaintiff stating that the pictures should be framed to keep the pastel from brushing off, and that he would give instructions to a man, whom he usually employed, to do it. The frames came, the pictures were put into them, and, after some correspondence, the defendant paid for them, and the pictures are still in his possession.

Upon this general statement of testimony, the plaintiff's claim was that he painted one portrait at an agreed price, and then another upon request, for which he had charged the same price, and that both were not only without conditions, but were said to be satisfactory. The defendant claims that the plaintiff agreed upon starting his work that, if the picture was not satisfactory, he would paint another; that, after expressing his dissatisfaction, the plaintiff immediately started another, which he did not finish; that the pictures were framed simply to preserve them until the last one should be finished; and that they have since remained with him in that way. These conflicting claims pre-

² For discussion of principles, see Clark on Contracts (2d Ed.) §§ 233-235.

sent obvious questions of fact for a jury. Numerous exceptions were taken at the trial, which can be better considered generally than in detail.

According to the defendant's statement that the work was to be satisfactory to him, he asked the court to instruct the jury that he had the right to reject the first portrait, if he was not satisfied with it. The judge instructed the jury that "satisfactory" means "reasonably satisfactory," but, in response to another request, he also instructed the jury that "an artist, if he agreed to paint a picture to one's satisfaction, has no cause of action for the price unless the buyer is satisfied, however good the picture is"; adding: "But, unless the man returns the picture, he is conclusively held to be satisfied." This last instruction, without the added sentence, states the law correctly, according to the current of authority; and, in giving the preceding instruction that a portrait must be "reasonably satisfactory," the judge doubtless had in mind another class of cases to which that limitation may apply. When the subject of the contract is one which involves personal taste or feeling, an agreement that it shall be satisfactory to the buyer necessarily makes him the sole judge whether it answers that condition. He cannot be required to take it because other people might be satisfied with it, for that is not what he agreed to do. Personal tastes differ widely, and, if one has agreed to submit his work to such a test, he must abide by the result. A large number of witnesses might be brought to testify that the work was satisfactory to them, that they considered it perfect, and that they could see no reasonable ground for objecting to it. But that would not be the test of the contract, nor should a jury be allowed to say in such a case that a defendant must pay because, by the preponderance of evidence, he ought to have been satisfied with the work, or, in other words, that it was "reasonably satisfactory."

Upon this principle numerous cases have been decided. In *McCarren v. McNulty*, 7 Gray (Mass.) 139 (an action to recover the price of a bookcase), the court said: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish material for a compensation the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain, the law can afford him no relief. Having voluntarily assumed the obligations and risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions." *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351, was to the same effect, where the subject of the action was a portrait. In *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446, the plaintiff was to make a bust of the defendant's deceased husband satisfactory to her. The court held that it was for her alone to determine whether it was so, and that it was not enough to show that her dissatisfaction was unreasonable. *Brown v.*

Foster, 113 Mass. 136, 18 Am. Rep. 463, was for a suit of clothes. Devens, J., said: "It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction." The doctrine was carried to very great length in *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207, where an elevator had been erected in a building, and "warranted satisfactory in every respect." It was held that, if it had been substantially completed so that the owner of the building could understand how it would operate, it could be rejected if it was not satisfactory.

In *Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709, the opinion sets out the two classes of cases with reference to which a distinction has been made. One class is that which involves personal taste and judgment, examples of which we have shown; and the other class is that where the subject-matter of the contract is such that the satisfaction stipulated for must be held to apply to quality, workmanship, salability, and other like considerations, rather than to personal satisfaction. For example, if one agrees to sell land with a satisfactory title, and shows a title valid and complete, the parties must have intended such a title to be satisfactory, rather than to leave an absolute right in the purchaser to say "I am not satisfied," when no reason could be shown why he should not be satisfied. So, if one agrees to do work in a satisfactory manner, it must mean a workman-like manner,—as well as it would be expected to be done,—rather than a merely personal or whimsical rejection. It is this class of cases to which the term "reasonably satisfactory" applies. Hence in the boiler case, last cited, it was held that a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and would not be regarded.

In *Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57, the court says: "In the one class the right of decision is completely reserved to the promisor, without being liable to disclose reasons or account for his course; and a right to inquire into the grounds of his action and overhaul his determination is absolutely excluded from the promisee and from all other tribunals. In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination upon grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness and the adequacy of the grounds of it, is open to consideration, and subject to the judgment of judicial triors." See, also, *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; *Daggett v. Johnson*, 49 Vt. 345; *Manufacturing Co. v. Brush*, 43 Vt. 528; 1 Beach, Mod. Cont. § 104. Even in cases of the latter class, where a rejection is made in good faith, the dissatisfaction of the purchaser is held in many decisions to be sufficient. See note to *Boiler Co. v. Garden*, 54 Am. Rep. 711 (s. c., 101 N. Y. 387, 4 N. E. 749).

The instruction to the jury in the present case that "satisfactory" means "reasonably satisfactory" was erroneous as applied to the subject-matter of the alleged contract. Evidently, the trial judge thought that the definition of the term was of little weight, because the defendant had not returned the pictures, or either of them, and hence he added the words: "But, unless the man returns the pictures, he is conclusively held to be satisfied." The same instruction appears so clearly in other parts of the charge that the jury must have understood that the retention of the pictures made the defendant liable for the price of both. Taken generally, the instruction would be quite correct upon the ground that one cannot retain the property of another and still refuse to pay for it. But the instruction as given ignores the defense set up in this case, which is that the first picture was not accepted, and the second not completed.

The demand relied on by the plaintiff is contained in his letter of January 7, 1896, in which he asks the defendant to send him both pictures for exhibition. To this the defendant replied that he wanted one, and objected to the other being shown as a likeness of his wife. He also testified that he had not objected to the removal of this one, but only to its exhibition. Now, whether, under the circumstances of this case, there was a refusal to return the pictures, or an excuse for the retention of one and a retention of the other because it was not completed, were questions of fact for the jury. The question whether the contract was as claimed by the defendant also raised a question of fact. If the jury had found that the contract was for a satisfactory portrait, that the second was satisfactory, but not completed, and that the other was not returned because of the suggestion of its exhibition, they might have found for the defendant. The facts that the pictures were on the walls of the defendant's home, and that he had paid for the frames, are such as would naturally be considered in determining an acceptance; but they do not conclude such determination, nor remove the questions from the jury.

The instruction, therefore, that by the mere retention of the pictures, under the circumstances of the case, the defendant was conclusively held to be satisfied with and liable for both, was erroneous. New trial granted.

2. PAYMENT

CHELTENHAM STONE & GRAVEL CO. v. GATES IRON WORKS.

(Supreme Court of Illinois, 1888. 124 Ill. 623, 16 N. E. 923.)

SHELDON, C. J. This is an appeal from a judgment of the appellate court for the First district, affirming a judgment of the superior court of Cook county. The case made by the evidence was this: Between March 19 and October 15, 1885, appellee, the Gates Iron Works, sold appellant, the Cheltenham Stone & Gravel Company, machinery and merchandise to the amount of \$3,940.97. Accounts were rendered monthly, and payments were made on account from time to time. During August, 1885, appellee received from appellant iron to the amount of \$2,600, and a note dated August 10, 1885, for \$1,000, due 90 days from said date, signed by the Cheltenham Improvement Company, payable to appellee. Both these items, the iron and the note, were credited appellant on appellee's books, and the statement of account rendered appellant on September 1st showed a credit of the two amounts, and the statement of account thereafter rendered started off with the balance after deducting these amounts.

When the transactions for the season were closed, appellee's books showed an indebtedness against appellant of \$145.97. This amount is conceded to be still due. Prior to the maturity of its note, the improvement company had become insolvent, and the note was not paid. Appellee sued the improvement company on the note, and obtained judgment, but was unable to collect it. Then it brought this suit against appellant on the account, ignoring the credit it had given for the amount of the note, and on the trial tendered appellant an assignment of its judgment against the improvement company. Appellee recovered a verdict and judgment for \$1,145.97, the full amount of its claim.

It is insisted that the presumption of law from these facts was that the note was taken in absolute payment; and, as there was no evidence offered tending to rebut that presumption, appellee was, on the case made by it, only entitled to a verdict for \$145.97; and that the court erred in not granting appellant's motion, made when the appellee rested its case, to direct the jury to find a verdict for appellee for \$145.97, and also in not giving the following instruction asked by appellant, but refused, viz.: "If the jury believe, from the evidence, that the note referred to was credited by the plaintiff to the defendant on the books of the plaintiff, and included as a credit in statement of account afterwards rendered by the plaintiff to defendant, then the

presumption of law is that said note was received in payment, and the burden of proof is upon the plaintiff to show that such was not the intention of the parties at the time said note was given; and if the plaintiff has failed to show such intention, that the same should not be received as payment, by a fair preponderance of testimony, the jury will find for the defendant on that issue."

Story, in his work on Promissory Notes (section 104), lays down the rule in this respect as follows: "In general, by our law, unless otherwise specially agreed, the taking of a promissory note for a pre-existing debt or a contemporaneous consideration is treated *prima facie* as a conditional payment only; that is, as payment only, if it is duly paid at maturity. But in some of the American states a different rule is applied, and, unless it is otherwise agreed, the taking of a promissory note is deemed *prima facie* an absolute payment of the pre-existing debt or other consideration. But, in each case, the rule is founded upon a mere presumption of the supposed intention of the parties, and is open to explanation and rebutter, by establishing, by proper proofs, what the real intention of the parties was; and this may be established, not only by express words, but by reasonable implication from the attendant circumstances."

In *Tobey v. Barber*, 5 Johns. (N. Y.) 68, 4 Am. Dec. 326, a note of a third person was given for rent due, and a receipt given for the rent. The note was not paid, the maker having become insolvent before the note became due. The court say: "The taking of the note was no extinguishment of the debt due for the rent. It is a rule, well settled and repeatedly recognized in this court, that taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment unless it be expressly agreed to take the note as payment, and to run the risk of its being paid, or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment in due time; and it was held that the inference arising from the receipt was not enough to establish such a positive agreement."

Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279, is to the same effect,—a case where the note of a third person had been given in payment of a debt, and a receipt in full given. *McIntyre v. Kennedy*, 29 Pa. 448; *Hunter v. Moul*, 98 Pa. 13, 42 Am. Rep. 610; *Brown v. Olmsted*, 50 Cal. 162,—are authorities in support of the rule that taking the note of a third person for a preexisting debt is no payment unless it be expressly agreed to take the note as payment. The decisions in this state are essentially to the same effect. *Walsh v. Lennon*, 98 Ill. 27, 38 Am. Rep. 75; *Wilhelm v. Schmidt*, 84 Ill. 185.

It is insisted that, although the acceptance of the note merely might not be payment, yet, treating the note as payment, as was done here, by crediting it as payment on appellee's books, and in statements of account rendered, shows that the note was taken in payment. We do not consider this any stronger evidence, in that regard, than were the receipts in full which were given in the cases cited from *Johnson*. In

regard to the receipt in *Johnson v. Weed*, the court remarked: "It might still have been understood, consistently with the words of it, [receipt,] that the note was received in full, under the usual condition of its being a good note." And so in *Brigham v. Lally*, 130 Mass. 485, a case where such a note of a third person had been taken on an open account, and the debtor credited therewith, it was held that the trial court properly refused to rule that placing the note to the credit of the defendant upon the plaintiff's journal and ledger, and making no other appropriation of the money, was in law a payment. We think the ruling of the court here complained of is entirely well sustained by authority.

Counsel for appellee, in his address to the jury, was allowed by the court, against appellant's objection, to argue that a scheme had existed whereby one of the defendant's officers had foisted the note upon the plaintiff, knowing the maker to be or about to become insolvent, so that the loss might fall upon the plaintiff; and an instruction asked by the defendant that there was no evidence in such regard, and that the jury should disregard the remarks of counsel with reference thereto, was refused; and this action of the court is assigned for error. While these remarks of counsel may have been improper, and the court might well have interposed as requested, we cannot say that the refusal to do so was such error as should cause a reversal of the judgment.

The judgment of the appellate court must be affirmed.

3. TENDER.

MOORE v. NORMAN.

(Supreme Court of Minnesota, 1892. 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526.)

Action by Ella M. Moore against H. G. Norman to recover possession of personal property. Verdict for defendant. From an order refusing a new trial, plaintiff appeals.

DICKINSON, J.³ The defendant, to secure two promissory notes executed by him to the plaintiff, mortgaged certain personal property to her. She prosecutes this action to recover possession of a part of the mortgaged property by virtue of her rights as such mortgagee. A former appeal in this action is reported in 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247.

The only issue to which reference is now necessary is as to wheth-

³ A portion of the opinion is omitted.

er certain payments and a tender of payment made by the defendant were sufficient and effectual to discharge the mortgages. The whole transaction on the part of the plaintiff was conducted by one George R. Moore, who was her general agent. Long after the maturity of the notes the defendant made a tender of payment to the plaintiff, which on his part is claimed to have been sufficient in amount, with payments which had been previously made, to complete the payment of the debt, and hence to discharge the mortgages. *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247.

The plaintiff, however, then claimed that the amount tendered was not sufficient to pay the debt; and whether it was so or not was one of the issues in this case, in respect to which the plaintiff's contention, that the amount was insufficient, was supported by evidence which would have sustained a verdict in her favor. The evidence tended to show that the tender was accompanied by a demand that the notes be surrendered; that such surrender was refused, a larger sum being claimed to be due; but that the plaintiff (by her agent, who held the notes) offered to receive the money tendered, and indorse it on the notes, which offer the defendant refused to accept. The court, at the request of the defendant, charged the jury to the effect that if the amount tendered was sufficient the defendant had a right to demand the surrender of his notes. This constitutes one of the errors assigned.

We think, as applied to the circumstances of this case, this instruction was erroneous. It may be stated as a general proposition, applicable at least where it appears that a larger sum than that tendered is in good faith claimed to be due, that the tender is not effectual as such if it be coupled with such conditions that the acceptance of it, as tendered, will involve an admission by the party accepting it that no more is due. *Leake*, Cont. 865, 866; *Add. Cont.* (9th Ed.) 153; 2 *Chit. Cont.* 1194; *Bowen v. Owen*, 11 Q. B. 130; *Finch v. Miller*, 5 C. B. 428; *Evans v. Judkins*, 4 Camp. 156; *Foord v. Noll*, 2 Dowl. (N. S.) 617; *Thayer v. Brackett*, 12 Mass. 450; *Wood v. Hitchcock*, 20 Wend. (N. Y.) 47; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148. See, further, in support of the general rule that a tender, to be effectual, must be absolute and unconditional, *Moore v. Norman*, 43 Minn. 428, 434, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247; *Bank v. Hove*, 45 Minn. 40, 42, 47 N. W. 449; *Balme v. Wambaugh*, 16 Minn. 116 (Gil. 106).

The most common and familiar illustrations of the proposition above stated are cases where the tender is made as being all that is due, or as payment in full. It is everywhere held that such a tender is not good. The debtor has no right to the benefit of a tender, as having the effect of a payment, when it is burdened with such a condition that the creditor cannot accept the money without compromise.

ing his legal right to recover the further sum which he claims to be due. This case falls within the same principle. By offering to pay the money only upon the condition that the plaintiff deliver up the notes, (if such was the fact,) the defendant insisted upon a condition the acceptance of which would at least seriously compromise the right of the plaintiff to recover any more, even though it should be true that the amount unpaid exceeded the sum tendered. The acceptance of the money and the surrender of the notes would be at least strong evidence against her, in the nature of an admission, that the notes were thereby fully paid.

The defendant should not be heard to assert that a mere offer to pay a specified sum, less than was supposed by the other party to be due, has the effect of a payment, so as to discharge the mortgage, when the offer was burdened with such a condition. It was enough for his protection that the plaintiff would have received the money offered and have indorsed its payment on the notes, which were already overdue and still in the hands of the plaintiff. If the defendant rejected this offer, and insisted upon the surrender of the notes, the natural and only reasonable construction to be put upon his conduct was that he insisted that the tender, if accepted, should be accepted as payment of the notes in full. If that was the effect of the tender, it was bad, under all the authorities. A mere tender should not be effectual to discharge the lien of a mortgage unless it be certainly sufficient in amount, and unburdened with any conditions which the debtor has not a clear right to impose. See *Moore v. Norman and Bank v. Hove*, supra.

A new trial must be granted for the reason above stated. * * *
Order reversed.

III. Discharge of Contract by Breach⁴

1. RENUNCIATION OF CONTRACT

(A) Before Performance is Due

O'NEILL v. SUPREME COUNCIL A. L. H.

(Supreme Court of New Jersey, 1904. 70 N. J. Law, 410, 57 Atl. 463,
1 Ann. Cas. 422.)

Action by Thomas O'Neill against the Supreme Council American Legion of Honor.

⁴ For discussion of principles, see Clark on Contracts (2d Ed.) §§ 239, 240, 243-249.

PITNEY, J.⁵ The declaration avers that in the year 1891 the defendant was a corporation of the state of Massachusetts, engaged in business in the state of New Jersey, and made a contract under seal with the plaintiff, known as a benefit certificate (set forth in full in the pleading), whereby it was certified that the plaintiff was a companion of the American Legion of Honor, and thereupon, in consideration of full compliance by him with all by-laws of the supreme council of that order, then existing or thereafter adopted, and the conditions in the benefit certificate contained, the supreme council agreed to pay to the plaintiff's sister, in trust for his six children, the sum of \$5,000, upon satisfactory proof of the plaintiff's death while in good standing upon the books of the supreme council. It alleges that the contract was made in consideration of the payment by the plaintiff of the assessments or premiums which might from time to time be called by the defendant. It avers payment by the plaintiff of all assessments called, and performance by him of all conditions, until the defendant broke the contract and declared the same void. It sets up that the defendant has failed, neglected, and refused to carry out the conditions of the contract, in that on August 22, 1900, on December 10, 1901, and on divers other days between those dates, the defendant declared to the plaintiff that it would not perform the contract or pay the insurance money thereby agreed to be paid, and that upon the plaintiff's death the beneficiaries would not be entitled to receive the sum of \$5,000, and that the defendant would not pay the same, but that the beneficiaries should receive only \$2,000. The declaration further avers that upon the breach of the contract by the defendant as aforesaid, and upon the several dates mentioned above, the plaintiff tendered to the defendant the same monthly assessments and payments as had been theretofore called or required by the defendant upon the contract, and the plaintiff offered and agreed to continue making such payments, and in all respects offered to comply with the terms and conditions of the contract; yet the defendant refused to accept from the plaintiff the assessments so tendered, and refused to recognize the contract or continue it in force; whereby the plaintiff has sustained damages, to recover which the action is brought. The defendant has pleaded the general issue and five special pleas. To each of the latter the plaintiff demurs.

The first question for consideration is whether the declaration sets forth a good cause of action. The cause of action asserted is not the right to recover the sum named in the benefit certificate according to its terms, but to recover damages for a renunciation of the agreement, by the party bound, in advance of the time set for performance. Numerous reported decisions have laid down the doctrine that where a contract embodies mutual and interdependent conditions and obligations, and one party either disables himself from performing, or

⁵ A portion of the opinion is omitted.

prevents the other from performing, or repudiates in advance his obligations under the contract, and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may at his option treat the contract as terminated for all purposes of performance, and maintain an action at once for damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance by the defendant. This doctrine has been followed in the English courts for more than half a century. *Hochster v. De La Tour* (1853) 2 El. & Black. 678, 22 L. J. Q. B. 455, 17 Jur. 972, 6 English Ruling Cases, 576; *Corts v. Ambergate, etc., Ry. Co.* (1851) 17 Ad. & El. (N. S.) Q. B. 127, 20 L. J. Q. B. 460, 15 Jur. 877; *Avery v. Bowden* (1855) 5 El. & Black. 714, 6 El. & Black. 953; *Danube, etc., Ry. Co. v. Xenos* (1861) 11 Com. Bench (N. S.) 152, 31 L. J. Q. B. 84, 5 L. T. 527, affirmed on appeal in *Exchequer Chamber*, 13 Com. Bench (N. S.) 825, 31 L. J. C. P. 284, 8 Jur. (N. S.) 439; *Frost v. Knight* (1872) L. R. 7 Exch. 111, 41 L. J. Ex. 78, 26 L. T. 77; *Johnstone v. Milling* (1886) L. R. 16 Q. B. Div. 460, 55 L. J. Q. B. 162, 54 L. T. 629; *Synge v. Synge* (1894) 1 Q. B. 466, 63 L. J. Q. B. 202, 70 L. T. 221.

In the leading case of *Hochster v. De La Tour*, Crompton, J., said, during the argument: "When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time (meaning, of course, for purposes of further performance); but I will hold you liable for the damage I have sustained, and I will proceed to make that damage as little as possible by making the best use I can of my liberty.' This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dismissal." And Lord Campbell, C. J., in delivering judgment, said: "It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. * * * The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer."

The same rule prevails in the Supreme Court of the United States. *Roehm v. Horst* (1899) 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, where numerous previous decisions of the same court are cited. And the great weight of authority in the state courts is to the same effect. *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Howard v. Daly*, 61 N. Y. 362, 374, 19 Am. Rep. 285; *Ferris v. Spooner*, 102 N. Y. 10, 5 N. E. 773; *Windmuller v. Pope*, 107 N. Y. 674, 14 N. E. 436; *Nichols v. Scranton Steel Co.* 137 N. Y. 471, 487, 33 N. E. 561; *Kadish v. Young*, 108 Ill. 170, 177, 43 Am. Rep. 548; *Roebbling's Sons Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518; *Lake Shore, etc., Ry. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Crabtree v. Messersmith*, 19 Iowa, 179; *McCormick v. Basal*, 46 Iowa, 235; *Hosmer v. Wilson*, 7 Mich. 294, 304, 74 Am. Dec. 716; *Platt v. Brand*, 26 Mich. 173; *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836; *Davis v. School Furniture Co.*, 41 W. Va. 717, 24 S. E. 630; *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355; *Sullivan v. McMillan*, 26 Fla. 543, 557, 8 South. 450; *Thompson v. Kyle*, 39 Fla. 582, 599, 23 South. 12, 63 Am. St. Rep. 193; *Fox v. Kitton*, 19 Ill. 519, 534; *Follansbee v. Adams*, 86 Ill. 13; *Adams v. Byerly*, 123 Ind. 368, 24 N. E. 130; *Kalkhoff v. Nelson*, 60 Minn. 284, 62 N. W. 332; *Signall v. Manufacturing Co.*, 59 Mo. App. 673, 682; *Manufacturing Co. v. McCord*, 65 Mo. App. 507; *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749; *Lee v. Mutual Life Ass'n*, 97 Va. 160, 33 S. E. 556.

The doctrine of *Hochster v. De La Tour* is generally recognized by the text-writers as established law: 7 Am. & Eng. Encycl. Law (2d Ed.) Title "Contracts," p. 150; Bish. Cont. § 1428; 2 Chitt. Cont. (11th Am. Ed.) 1067, 1079; 2 Pars. Cont. (8th Ed.) 781 (*667); *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225; *Benj. Sales* (Corb. Ed.) §§ 859, 860.

So far as observed, the only states dissenting from the doctrine are Massachusetts, Nebraska, and North Dakota. *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384; *Carstens v. McDonald*, 38 Neb. 858, 57 N. W. 757; *King v. Waterman*, 55 Neb. 324, 75 N. W. 830; *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760. The latter decision is based partly, and the Nebraska decisions principally, upon the authority of *Daniels v. Newton*, which is the leading case upon this side of the question. It is there held that a mere refusal of performance by the promisor, before the time for performance arrives, cannot form a ground of damages. But in *Parker v. Russell*, 133 Mass. 74, it was held a refusal of performance of a substantial part of the contract, after the time for entering upon performance has begun, entitles the injured party to treat the entire contract as absolutely broken, and to recover immediately his damages, based upon the whole value of the contract, including compensation for nonperformance in the future as well as in the past. In *Ballou v. Billings*, 136 Mass. 307, it was held that, for purposes of rescission

by the promisee, notice that the promisor will not perform has the same effect as an actual breach. These and other cases show that, even in Massachusetts, the reasoning on which the decision in *Daniels v. Newton* was based is hardly carried to its logical conclusion. *Jewett v. Brooks*, 134 Mass. 505; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538; *Paige v. Barrett*, 151 Mass. 67, 23 N. E. 725; *Whitten v. New England, etc., Co.*, 165 Mass. 343, 43 N. E. 121. Upon the precise point now presented, however, the authority of *Daniels v. Newton* is still recognized in Massachusetts, as appears from a recent decision in a case that is "on all fours" with the one now before us. *Porter v. American Legion of Honor* (1903) 183 Mass. 326, 67 N. E. 238.

The general question of repudiation of contracts is ably discussed by Prof. Williston in 14 Harv. Law Rev. 317, 421, with an ample citation of cases. He combats the doctrine of *Hochster v. De La Tour*, while conceding that it is sustained by the great weight of authority.

There seems to be no controlling decision in our own state; at least, no reported case that is precisely in point. In *Parker v. Pettit*, 43 N. J. Law, 512, which was an action brought by the purchaser to recover damages for refusal to deliver goods purchased, the vendor, prior to the time of performance, had declared his intention not to perform, and had likewise disabled himself from performing by selling the goods to another. This court held that thereby the vendor had dispensed with the performance of conditions precedent by the purchaser, and that neither a demand of performance nor a tender of the consideration money was necessary. It was intimated by Mr. Justice Depue, in the opinion, that the defendant's refusal of performance, before the time for performance arrived, did not of itself amount to a breach of the contract so as to authorize a suit before the time for performance; but this was obiter dictum, for the suit was in fact brought after that time. In *Vickers v. Electrozone Commercial Co.*, 67 N. J. Law, 665, at page 671, 52 Atl. 467, at page 469, Judge Vredenburg, speaking for the Court of Errors & Appeals, declared that "a party injured by the repudiation of a contract by the other party, also bound by it has an election of remedies he may pursue, one of which is that he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing, and the contract would be continued in force for that purpose."

It must be conceded that the adoption of this rule was not necessary for the decision of the case, which was an action to recover damages for the past breach of a single covenant, and was not based upon a repudiation of the entire agreement. But as a pronouncement by our court of last resort, agreeing, as it does, with the English and most of the American decisions, the expression quoted is entitled to

great weight in this court. Upon the whole, we are satisfied that the doctrine of *Hochster v. De La Tour* is well founded in principle as well as supported by authority. We are also clear that it applies to such a contract as the one in suit, and that the declaration sets forth a renunciation so clear and unequivocal as to give ground for an action, it being averred that the defendant has declared to the plaintiff that it will not perform the contract, and has refused to accept the monthly assessments tendered by the plaintiff in performance of conditions precedent on his part. * * *

The plaintiff is entitled to judgment.

(B) In the Course of Performance

WIGENT v. MARRS.

(Supreme Court of Michigan, 1902. 130 Mich. 609, 90 N. W. 423.)

Action by Gardner A. Wigent against Thomas Marrs, administrator of the estate of Chloe R. McClung, deceased. There was a judgment in favor of defendant, and plaintiff brings error.

HOOKE, C. J. Plaintiff recovered a verdict and judgment in an action of assumpsit before a justice of the peace, which was reversed in the circuit court on appeal. The declaration was upon the common counts. The facts were undisputed, and in substance are as follows: In May, 1901, defendant's intestate gave a written order to plaintiff's agents for a monument to be erected upon her lot in the cemetery at the agreed price of \$100, the same to be completed between that date and June 30, 1901, unless unforeseen causes should prevent, and in that event as soon thereafter as practicable. It was to be set upon a foundation to be erected by her. The contract was approved by the plaintiff on May 14th, of which Mrs. McClung was notified, and at the same time the monument was ordered to be made at the quarry. The latter part of June the plaintiff notified her to get the foundation ready, in response to which she wrote him that he need not bring that monument, as it did not come according to agreement. On July 5th plaintiff replied, stating that the monument was well under way, and he could not allow her to countermand her order: that it would be delivered as soon as completed, and would be strictly according to contract, and she was requested to have her foundation built as soon as possible. In response to this she wrote: "You have not done according to agreement at all. You was to have it up by the 30th of June at the farthest. We are not obliged to wait your motion, so, if you bring it, you may take it back." The plaintiff had the monument

completed and set up upon a foundation erected by himself. This action was brought to recover the contract price and \$1.50 for the foundation, with interest from August 23, 1900.

It was shown that the delay was caused by unforeseen circumstances. No complaint was made of the workmanship, which was such that the monument could not be used for any other purpose. The defendant claims that the plaintiff, upon receipt of Mrs. McClung's letter, had no legal right to complete the contract and recover the price; that his only remedy was to recover in damages for a breach of the contract. Plaintiff, on the other hand, claims that it was competent to treat the contract as performed, and that he is entitled to recover the contract price upon the common counts. It is undisputed that defendant unqualifiedly renounced this contract before the monument was completed, and forbade its completion and erection upon her premises. Many authorities hold that she had the right to do this, and thereafter plaintiff's right of recovery would be limited to damages for the breach of the contract involved in the renunciation. In *Mechem, Sales*, § 1091, the author says: "The law is well settled that a party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by reason of having his performance checked at that stage in its progress." "The contract is not rescinded, but broken; and, immediately the other party has the right to deem it in force for the purpose of the recovery of his damages, he is under no obligation for that purpose to tender complete performance, nor has he the right to unnecessarily enhance the damages by proceeding after the countermand to finish his undertaking." *Id.* § 1092.

This subject is discussed in the case of *Hosmer v. Wilson*, 7 Mich., at page 305, 74 Am. Dec. 716, where Mr. Justice Christiancy says: "And it is certainly very questionable whether the party thus notified has a right to go on after such notice to increase the amount of his own damages. In *Clark v. Marsiglia*, 1 Denio (N. Y.) 317, 43 Am. Dec. 670, it was held he had no such right, and that the employer has a right (in a contract for work and labor) to stop the work, if he choose, subjecting himself to the consequences of a breach of his contract; and that the workman, after notice to quit work, has no right to continue his labor, and recover pay for it. This doctrine is fully approved in *Derby v. Johnson*, 21 Vt. 21." Mr. Justice Christiancy adds that: "This would seem to be good sense, and therefore sound law; and it would seem that any other rule must tend to the injury, and in many cases to the ruin, of all parties." In the case of *Danforth v. Walker*, 37 Vt. 244, the court said of a similar case: "While a contract is executory, a party has the power to stop the performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being

stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such increased damages of the other party." See, also, *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Clause v. Printing Press Co.*, 118 Ill. 612, 9 N. E. 201.

We are cited by plaintiff's counsel to the case of *Black v. Herbert*, 111 Mich. 638, 70 N. W. 138, as a case on all fours with the present case, but we think it is readily distinguishable. In that case, after renunciation the parties met by appointment, and the plaintiff was permitted to alter and set up the monument. It became, therefore, a question for the jury whether or not the contract had been performed. Renunciation must be more than mere idle talk of nonperformance; it must be a distinct, unequivocal, and absolute refusal to receive performance or to perform on his own part. *Mechem, Sales*, § 1087. The party attempting to renounce may withdraw his renunciation and have the contract performed (*Id.* § 1090), and it would seem that the defendant in that case did so.

There are only two theories upon which the common counts could be relied upon in this case: First, upon the theory that the contract had been performed, and that the contract price was therefore recoverable; and, second, for the work and material used in the foundation built by the plaintiff. The undisputed facts show that the contract was not performed on receipt of the renunciation, and there could be no recovery for the erection of the foundation, because the plaintiff was never requested to build it, but, on the contrary, was prohibited from doing anything further in performance of the contract. The only redress that the plaintiff would be entitled to recover would be damages for the breach of the contract if renunciation should be found to be unwarranted, which does not appear.

It follows that the judgment must be affirmed.

2. FAILURE OF PERFORMANCE

(A) Independent Promises

(a) ABSOLUTE PROMISES

See *Morton v. Lamb*, post, p. 396.

(b) PROMISES THE PERFORMANCE OF WHICH IS DIVISIBLE

NORRINGTON v. WRIGHT et al.

(Supreme Court of the United States, 1885. 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.)

In error to the circuit court of the United States for the Eastern district of Pennsylvania.

The facts fully appear in the following statement by Mr. Justice GRAY:

This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"Philadelphia, January 19, 1880.

"Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at forty-five dollars (\$45.00) per ton of 2,240 lbs. custom-house weight, ex ship Philadelphia. Settlement, cash, on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia. Edward J. Etting, Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5,000 tons of T iron rails, to be shipped at the rate of about 1,000 tons a month, beginning in February, and ending in July, 1880. The second count set forth

the contract verbatim. Each of these two counts alleged that the plaintiffs in February, March, April, May, June, and July shipped the goods at the rate of about 1,000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs, at the rate of about 1,000 tons a month, in March, April, May, June, and July. The defendants pleaded non assumpsit.

The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment. The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival, but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th, as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances, and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other

things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but, as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits. As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application."

On June 10th Etting offered to the defendants the alternative of delivering to them one thousand tons strict measure on account of the shipments in April. This offer they immediately declined. On June 15th Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments, (designated by the names of the vessels,) had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification

as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken. From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended (1) that under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in any one month; (2) that, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff. But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them. The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 Best & S. 751; *Bowes v. Shand*, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768; *Davison v. Von Lingen*, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments, or deliveries of so many distinct quantities of iron. *Mersey S. & I. Co. v. Naylor*, 9 App. Cas. 434, 439. The further provision that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for. The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning

February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July.

The contract is not one for the sale of a specific lot of goods, identified by independent circumstances,—such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill,—in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." *Brawley v. U. S.*, 96 U. S. 168, 171, 172, 24 L. Ed. 622. The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission. The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the

omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract. The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of *Hoare v. Rennie*, 5 Hurl. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August, and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross-action. But judgment was given for the defendants, Chief Baron Pollock saying: "The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that, in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract,—they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to

the action." 5 Hurl. & N. 28. So in *Coddington v. Paleologó*, L. R. 2 Exch. 193, while there was a division of opinion upon the question whether a contract to supply goods, "delivering on April 17th, complete 8th May," bound the seller to begin delivering on April 17th, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand in *Simpson v. Crippin*, L. R. 8 Q. B. 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for 12 months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt v. Lawrence*, 1 Q. B. Div. 344, in which the contract was for the purchase of 4,500 quarters, 10 per cent. more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of *Bowes v. Shand*, after conflicting decisions in the queen's bench division and the court of appeal, was finally determined by the house of lords. 1 Q. B. Div. 470; 2 Q. B. Div. 112; 2 App. Cas. 455. In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast for this port during the months of March and/or April, 1874, per Rajah of Cochin." The 600 tons filled 8,200 bags, of which 7,120 bags were put on board, and bills of lading signed in February; and for the rest, consisting of 1,030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the house of lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months. In the opinions therè delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said: "It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months.

It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning,—it is no observation which can dispose of, or get rid of, or displace, that literal meaning,—to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that is a matter of which the seller and purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled." Pages 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." "The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract." Pages 467, 468.

Lord Blackburn said: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants

can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it." 2 App. Cas. 480, 481.

Soon after that decision of the house of lords, two cases were determined in the court of appeal. In *Reuter v. Sala*, 4 C. P. Div. 239, under a contract for the sale of "about 25 tons (more or less) black pepper, October ^{and/or} November shipment, from Penang to London, the name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within 60 days from date of bill of lading," the seller, within the 60 days, declared 25 tons by a particular vessel, of which only 20 tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In *Honck v. Muller*, 7 Q. B. Div. 92, under a contract for the sale of 2,000 tons of pig-iron to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one-third in December and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as canceled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the house of lords in *Mersey Co. v. Naylor*, 9 App. Cas. 434, affirming the judgment of the court of appeal in 9 Q. B. Div. 648, and following the decision of the court of common pleas in *Freeth v. Burr*; L. R. 9 C. P. 208. But the point there decided was that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the house of lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first installment. The lord chancellor said: "The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore, it is one contract for the purchase of that quantity of steel blooms. No doubt, there are subsidiary terms in the contract, as to the time of delivery,—'delivery 1,000 tons monthly, commencing January next,'—and as to the time of payment,—'payment net cash within three days after receipt of shipping documents,'—but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is per-

fectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract by the delivery of the undelivered steel." 9 App. Cas. 439.

Moreover, although in the court of appeal dicta were uttered tending to approve the decision in *Simpson v. Crippin*, and to disparage the decisions in *Hoare v. Rennie* and *Honck v. Muller*, above cited, yet in the house of lords *Simpson v. Crippin* was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in *Honck v. Muller*, distinguished *Hoare v. Rennie* and *Honck v. Muller* from the case in judgment. 9 App. Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare v. Rennie* and *Coddington v. Paleologo*, as well as in the later cases of *Reuter v. Sala* and *Honck v. Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Crippin* and *Brandt v. Lawrence*, and to accord better with the general principles affirmed by the house of lords in *Bowes v. Shand*, while it in no wise contravenes the decision of that tribunal in *Mersey Co. v. Naylor*.

In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are *Hill v. Blake*, 97 N. Y. 216, which accords with *Bowes v. Shand*, and *King Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603, which approves and follows *Hoare v. Rennie*. The recent cases in the supreme court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn v. Bodine*, 60 Pa. 182, 100 Am. Dec. 560, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during the months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan v. McKee*, 77 Pa. 228, and in *Scott v. Kittanning Coal Co.*, 89 Pa. 231, 33 Am. Rep. 753, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one installment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for, and used a previous installment of the goods. The decision of the supreme judicial court of Massachusetts in *Winchester v. Newton*, 2 Allen, 492, resembles that of the house of lords in *Mersey Co. v. Naylor*.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because

the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk v. Spence*, 4 Camp. 329; *Graves v. Legg*, 9 Exch. 709; *Reuter v. Sala*, above cited. Judgment affirmed.

(B) *Conditional Promises*

(a) CONCURRENT CONDITIONS

MORTON v. LAMB.

(Court of King's Bench, 1797. 7 Term R. 125.)

In an action on the case the plaintiff declared against the defendant for that whereas on the 10th Feb. 1796, at Manchester in the county of Lancaster, in consideration that the plaintiff, at the special instance and request of the defendant had then and there bought of the defendant 200 quarters of wheat at £5 Os. 6d. per quarter, such price to be therefore paid by the plaintiff to the defendant, he the defendant undertook and then and there promised the plaintiff to deliver the said corn to him (the plaintiff) at Shardlow in the county of Derby in one month from that time, viz. of the sale; and then he alleged that although he (the plaintiff) always from the time of making such sale for the space of one month then next following and afterwards was ready and willing to receive the said corn at Shardlow, yet the defendant not regarding his said promise &c. did not in one month from the time of the making of such sale as aforesaid or at any other time deliver the said corn to the plaintiff at Shardlow or elsewhere, although he (the defendant) was often requested so to do, &c. The defendant pleaded the general issue; and at the trial the plaintiff recovered a verdict.

Mr. Holroyd obtained, in the last term, a rule calling on the plaintiff to shew cause why the judgment should not be arrested, because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery. * * *

Lord KENYON, Ch. J.^o If this question depended on the technical niceties of pleading, I should not feel so much confidence as I do: but it depends altogether on the true construction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at Shardlow within a certain time; and there can be

^o Concurring opinions by Grose and Lawrence, JJ., are omitted.

no doubt but that the parties intended that the payment should be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to Shardlow, but that he did not deliver it to the plaintiff: to this declaration the defendant objects, and says "I did not deliver the corn to you (the plaintiff), because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the corn;" and the question is whether that should or should not have been alleged.

The case decided by Lord Holt, in Salk. 112, if indeed so plain a case wanted that authority to support it, shows that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed or was ready to perform, his part of the contract. Then the plaintiff in this case cannot impute to the defendant the nondelivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a court of justice, must show that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condition precedent, and some cases have been cited to prove it: but they do not appear to me to be applicable. In the one in Saunders (Saund. 350), the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the case in Salk. 171, where work was to be done, and then the workman was to be paid. And in ordinary cases of this kind the work is to be done before the wages are earned: but those cases do not apply to the present, where both the acts are to be done at the same time.

Speaking of conditions precedent and subsequent in other cases only leads to confusion. In the case of Campbell v. Jones, I thought, and still continue of that opinion, that whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done: but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it. * * *

Rule absolute.

(b) VITAL CONDITIONS

POPE et al. v. ALLIS.

(Supreme Court of the United States. 1885. 115 U. S. 363, 6 Sup. Ct. 63, 29 L. Ed. 393.)

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Edward P. Allis, the defendant in error, was the plaintiff in the circuit court. He brought his suit to recover from the defendants Thomas J. Pope and James E. Pope, now the plaintiffs in error, the sum of \$17,840, the price of 500 tons of pig-iron, which he alleged he had bought from them and paid for, but which he refused to accept because it was not of the quality which the defendants had agreed to furnish. The plaintiff also demanded \$1,750 freight on the iron, which he alleged he had paid. The facts appearing upon the record were as follows: The plaintiff carried on the business of an iron-founder in Milwaukee, Wisconsin, and the defendants were brokers in iron in the city of New York. In the month of January, 1880, by correspondence carried on by mail and telegraph, the defendants agreed to sell and deliver to the plaintiff 500 tons of No. 1 extra American and 300 tons No. 1 extra Glengarnock (Scotch) pig-iron. The American iron was to be delivered on the cars at the furnace bank at Coplay, Pennsylvania, and the Scotch at the yard of the defendants in New York. By a subsequent correspondence between the plaintiff and the defendants it fairly appeared that the latter agreed to ship the iron for the plaintiff at Elizabethport, New Jersey. It was to be shipped as early in the spring as cheap freights could be had, consigned to the National Exchange Bank at Milwaukee, which, in behalf of the plaintiff, agreed to pay for the iron on receipt of the bills of lading. That quantity of American iron was landed at Milwaukee and delivered to the plaintiff about July 15th. Before its arrival at Milwaukee the plaintiff had not only paid for the iron, but also the freight from Coplay to Milwaukee. Soon after the arrival in Milwaukee the plaintiff examined the 500 tons American iron, to which solely the controversy in this case referred, and refused to accept it, on the ground that it was not of the grade called for by the contract, and at once gave the defendants notice of the fact, and that he held the iron subject to their order, and brought this suit to recover the price of the iron and the freight thereon.

The defenses relied on to defeat the action were (1) that the iron delivered by the defendants to the plaintiff was No. 1 extra American iron, and was of the kind and quality required by the contract: and (2) that the title having passed to the plaintiff when the iron was

shipped to him at Elizabethport, he could not afterwards rescind the contract and sue for the price of the iron and the freight which he had paid, but must sue for a breach of the warranty.

It was conceded upon the trial that if the plaintiff was entitled to recover at all, his recovery should be for \$22,315.40. The defendants pleaded a counterclaim for \$5,311, which was admitted by the plaintiff. The jury returned a verdict for the plaintiff for \$16,513.11, for which sum and costs the court rendered a judgment against the defendants. This writ of error brings that judgment under review.

WOODS, J.¹ * * * 4. The assignment of error mainly relied on by the plaintiffs in error is that the court refused to instruct the jury to return a verdict for the defendants. The legal proposition upon which their counsel based this request was that the purchaser of personal property, upon breach of warranty of quality, cannot, in the absence of fraud, rescind the contract of purchase and sale, and sue for the recovery of the price. And they contended that, as the iron was delivered to defendant in error either at Coplay or Elizabethport, and the sale was completed thereby, the only remedy of the defendant in error was by a suit upon the warranty. It did not appear that at the date of the contract the iron had been manufactured, and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error until a short time before its shipment, in the latter part of April and the early part of May. The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. It was established by the verdict of the jury that the iron shipped was not of the quality required by the contract. Under these circumstances the contention of the plaintiffs in error is that the defendant in error, although the iron shipped to him was not what he bought, and could not be used in business, was bound to keep it, and could only recover the difference in value between the iron for which he contracted and the iron which was delivered to him.

We do not think that such is the law. When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to its identity and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. *Chanter v. Hopkins*, 4 Mees. & W. 404; *Barr v. Gibson*, 3 Mees. & W. 390; *Comperz v. Bartlett*, 2 El. & Bl. 849; *Okell v. Smith*, 1 Stark, N. P.

¹ A portion of the opinion is omitted.

107; notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. (7th Amer. Ed.) 37; *Woodle v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102; *Boothby v. Scales*, 27 Wis. 626; *Fairfield v. Madison Manuf'g Co.*, 38 Wis. 346. See, also, *Nichol v. Godts*, 10 Exch. 191. So, in a recent case decided by this court, it was said by Mr. Justice Gray: "A statement" in a mercantile contract "descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. See, also, *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372. And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond the buyer may refuse to receive them; or, if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. *Lorymer v. Smith*, 1 Barn. & C. 1; *Magee v. Billingsley*, 3 Ala. 679.

The authorities cited sustain this proposition: that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer, when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract. The rulings of the circuit court were in accordance with these views.

We have been referred by the plaintiffs in error to the cases of *Thornton v. Wynn*, 12 Wheat. 184, 6 L. Ed. 595, and *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847, to sustain the proposition that the defendant in error in this case could not rescind the contract and sue to recover back the price of the iron. But the cases are not in point. In the first, there was an absolute sale with warranty and delivery to the vendee of a specific chattel, namely, a race-horse; in the second, the sale was of a specified and designated lot of flour which the vendee had accepted, and part of which he had used, with ample means to ascertain whether or not it conformed to the contract.

The cases we have cited are conclusive against the contention of the plaintiffs in error. The jury has found that the iron was not of the quality which the contract required, and on that ground the defendant in error, at the first opportunity, rejected it, as he had a right to do. His suit to recover the price was, therefore, well brought.

Other errors are assigned, but, in our opinion, they present no ground for the reversal of the judgment, and do not require discussion. Judgment affirmed.

(c) WARRANTIES

BRYANT v. ISBURGH.

(Supreme Judicial Court of Massachusetts, 1859. 13 Gray, 607,
74 Am. Dec. 655.)

Action of contract to recover the price of a horse sold and delivered to the defendant by the plaintiff. Answer, that the plaintiff warranted the horse to be sound at the time of the sale; that the horse proved to be unsound, and was returned to the plaintiff. The plaintiff did not receive the horse back, but declined to do so. Verdict for plaintiff, with deduction for damages.

The court charged that the defendant had no right to return the horse and rescind the contract, in the absence of fraud, unless such a remedy was provided for by the terms of the contract. Defendant excepted to this charge.⁸

METCALF, J. The precise question in this case is, whether a purchaser of personal property, sold to him with an express warranty, and taken into possession by him, can rescind the contract and return the property, for breach of the warranty, when there is no fraud, and no express agreement that he may do so. It appears from the cases cited for the plaintiff that in the English Courts, and in some of the courts in this country, he cannot, and that his only remedy is on the warranty. See, also, 2 Steph. N. P. 1296; Addison on Cont. (2d Am. Ed.) 272; Oliphant's Law of Horses, 88; Cripps v. Smith, 3 Irish Law R. 277.

But we are of opinion (notwithstanding a dictum of Parsons, C. J., in *Kimball v. Cunningham*, 4 Mass. 505, 3 Am. Dec. 230) that, by the law of this commonwealth, as understood and practiced upon for more than forty years, there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter which he has under the former; and that he to whom property is sold with express warranty, as well as he to whom it is sold with implied warranty, may rescind the contract for breach of warranty, by a seasonable return of the property, and thus entitle himself to a full defense to a suit brought against him for the price of the property, or to an action against the

* The statement of facts is abridged.

seller to recover back the price, if it has been paid to him. In *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122, where it was decided that a sale by sample was tantamount to an express warranty that the sample was a true representative of the kind of thing sold (and in which case there was no fraud), Chief Justice Parker said: "If a different thing is delivered, he" (the seller) "does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him." This, it is true, was only a dictum, and not to be regarded as a decisive authority. But in *Perley v. Balch*, 23 Pick. 283, 34 Am. Dec. 56, which was an action on a promissory note given for the price of an ox sold to the defendant, it was adjudged that the jury were rightly instructed that if, on the sale of the ox, there was fraud, or an express warranty and a breach of it, the defendant might avoid the contract by returning the ox within a reasonable time, and that this would be a defense to the action. In *Dorr v. Fisher*, 1 Cush. 274, it was said by Shaw, C. J., that "to avoid circuitry of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud. But if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor; and without this he cannot recover." The chief justice took no distinction between an express warranty and an implied one, but referred, in support of what he had said (with other cases), to *Perley v. Balch*, cited above.

In 1816, when the case of *Bradford v. Manly* was before this court, and afterwards, until 1831, the law of England, on the point raised in the present case, was supposed to be as we now hold it to be here. Lord Eldon had said, in *Curtis v. Hannay* (3 Esp. R. 82), that he took it to be "clear law;" and so it was laid down in 2 Selw. N. P. (1st Ed.) 586, in 1807, and in *Long on Sales*, 125, 126, in 1821, and in 2 Stark. Ev. (1st Ed.) 645, in 1825. In 1831, in *Street v. Blay* (2 B. & Ad. 461), Lord Eldon's opinion was first denied, and a contrary opinion expressed by the court of the king's bench. Yet our court subsequently (in 1839) decided the case of *Perley v. Balch*. The doctrine of that decision prevents circuitry of action and multiplicity of suits, and at the same time accomplishes all the ends of justice. Exceptions sustained.

ISAACS v. WANAMAKER.

(Supreme Court of New York. 1911. 71 Misc. Rep. 55, 127 N. Y. Supp. 346.)

Action by David Isaacs against John Wanamaker. There was a judgment for plaintiff, and defendant moves for a new trial.

POUND, J. It seems to be the law of New York and of this case

that a buyer who has bought with a warranty may not return his purchase and rescind the sale upon warranty broken. While the question has, in a way, been kept open by the Court of Appeals (*Kupfer Co. v. Pellman*, 67 Misc. Rep. 149, 151, 121 N. Y. Supp. 1081), the rule has often been so stated, and I fail to see any other theory on which the judgment herein was reversed in that court. *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 269, 23 N. E. 372, 16 Am. St. Rep. 753; *Isaacs v. Wanamaker*, 189 N. Y. 122, 81 N. E. 763. While in many other jurisdictions a buyer who has bought with a warranty may rescind the sale upon warranty broken, and the proposed uniform sale of goods act gives this remedy. *Williston on Sales*, §§ 603, 608. Where the thing bought, when delivered, is perfectly worthless, the buyer may tender it back and recover the purchase money. *Stone v. Frost*, 61 N. Y. 614. And if there is a contract to sell, instead of a bargain and sale, and a delivery pursuant to the contract, the buyer may reject for breach of warranty and recover back the purchase price. *Voorhees v. Earl*, 2 Hill, 288, 291, 38 Am. Dec. 588. But even if the proofs in this case tended to show an executory contract to sell and deliver an automobile to be put into good repair and good running condition—which is doubtful—the complaint alleges an executed sale with warranties and representations as to the present condition of the automobile.

With the distinction above indicated in mind, there would be fatal variance between pleadings and proof, if the case were submitted on the theory of an executory sale. The case was submitted to the jury on the theory of failure of consideration, and they found for the plaintiff. The weight of evidence is with the defendant that there was no such total failure of consideration as to deprive him of the right to litigate damages. In *Alsing Co. v. New England Quartz Co.*, 66 App. Div. 473, 73 N. Y. Supp. 347, affirmed 174 N. Y. 536, 66 N. E. 1110, cited by plaintiff, the question of damages for breach of express warranty was litigated, and evidence was given that the machine was "useless and could not be set right by any system of repairs." No such evidence was before the jury in this case, and the weight of evidence was that the automobile in suit could be set as right as it was when plaintiff bought it for no large amount, and then, while it would not, perhaps, be worth the purchase price, \$1,200, it would have a substantial value as an automobile of the period of 1904.

Motion for new trial must be granted upon defendant's exceptions and on the ground that the verdict was contrary to the evidence and contrary to the law. Costs to abide the event. So ordered.

IV. Discharge by Impossibility of Performance⁹

See, also, Appeal of Billings, *supra*, p. 330.

ANDERSON v. MAY et al.

(Supreme Court of Minnesota, 1892. 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642.)

Action by G. W. Anderson against L. L. May & Co. on a certain contract. From a judgment for plaintiff, defendant appeals.

GILFILLAN, C. J. The defendant having alleged as a counterclaim a contract in June, 1890, between him and plaintiff, whereby the latter agreed to sell and deliver to the former, on or before November 15th, certain quantities of specified kinds of beans, and that he failed so to do except as to a part thereof, the plaintiff, in his reply, alleged in substance that the contract was to deliver the beans from the crop that he should raise that year from his market gardening farm near Red Wing.

Upon the trial the contract was proved by letters passing between the parties. From these it fairly appears that the beans to be delivered were to be grown by plaintiff, though it cannot be gathered from them that he was to grow the beans on any particular land. They contain no restriction in that respect. There can be no question that, if grown by him, and of the kinds and quality specified, defendant would have been obliged to accept the beans, though not grown on any land previously cultivated by plaintiff. The contract, therefore, was, in effect, to raise and sell and deliver the quantities, kinds, and quality of beans specified,—a contract in its nature possible of performance. As an excuse for not delivering the entire quantity contracted for, the plaintiff relies on proof of the fact that an early unexpected frost destroyed or injured his crop to such extent that he was unable to deliver the entire quantity.

What, in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for non-performance of a contract, is well settled in the decisions; the only apparent difference in them arising from the application of the rules to particular circumstances. The general rule is as well stated as anywhere in 2 Chit. Cont. 1074, thus: "Where the contract is to do a thing which is possible in itself, or where it is conditioned on any event which happens, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it; for it was his own fault to run

⁹ For discussion of principles, see Clark on Contracts (2d Ed.) § 250.

the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. And therefore, in such cases, the performance is not excused by the occurrence by an inevitable accident, or other contingency, although it was not foreseen by, or within the control of, the party." An application of this rule is furnished by *Cowley v. Davidson*, 13 Minn. 92, (Gil. 86.)

What is sometimes called an "exception to the rule" is where the contract is implied to be made on the assumed continued existence of a particular person or thing, and the person or thing ceases to exist, as, where it is for personal service, and the person dies, or it is for repairs upon a particular ship or building, and the ship or building is destroyed. An agreement to sell and deliver at a future time a specific chattel existing when the agreement is made would come under this exception. The exception was extended further than in any other case we have found in *Howell v. Coupland*, L. R. 9 Q. B. 462. That was a contract to sell and deliver a certain quantity from a crop to be raised on a particular piece of land, and the entire crop was destroyed by blight. The court held the contract to be to deliver part of a specific thing, to wit, of the crop to be grown on a given piece of land, and held it to come within the rule that, where the obligation depends on the assumed existence of a specific thing, performance is excused by the destruction of the thing without the parties' fault. Without intimating whether we would follow that decision in a similar case, we will say that the case is unlike this, in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and deliver part of a specific crop, but a general undertaking to raise, sell, and deliver the specified quantity of beans.

We have been cited to and found no case holding that, where one agrees generally to produce, by manufacture or otherwise, a particular thing, performance being possible in the nature of things, he may be excused from performance by the destruction, before completion or delivery, of the thing, from whatever cause, except the act of the other party. Applications of the general rule, where the thing agreed to be produced was, before completion, destroyed without the party's fault, are furnished in *Adams v. Nichols*, 19 Pick. (Mass.) 275, 279, 31 Am. Dec. 137; *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; and *Trustees v. Bennett*, 27 N. J. Law, 513, 72 Am. Dec. 373, approved and followed in *Steas v. Leonard*, 20 Minn. 494, (Gil. 448.) Where such causes may intervene to prevent a party performing, he should guard against them in his contract. Order reversed.

V. Discharge by Operation of Law ¹⁰

1. MERGER

CLIFTON v. JACKSON IRON CO.

(Supreme Court of Michigan, 1889. 74 Mich. 183, 41 N. W. 891, 16 Am. St. Rep. 621.)

Trespass by Charles Clifton against the Jackson Iron Company for cutting timber from plaintiff's land. Judgment for plaintiff, and defendant brings error.

CAMPBELL, J. Plaintiff sued defendant for trespass in cutting his timber in the winter of 1885-86. The defense set up was that the timber, though on plaintiff's land, belonged to defendant. This claim was based on the fact that on September 22, 1877, a little more than eight years before the trespass, defendant made a contract to sell the land trespassed on to plaintiff, but with this reservation: "Reserving to itself, its assigns and corporate successors, the ownership of pine, butternut, hemlock, beech, maple, birch, iron-wood, or other timber suitable for sawing into lumber, or for making into firewood or charcoal, now on said tract of land, and also the right to cut and remove any or all of said timber, at its option, at any time within ten years from and after the date of these presents." There were some unimportant provisions, also, not now material.

Plaintiff showed that on November 4, 1885, the defendant conveyed to him the land in question by full warranty deed, and with no exceptions or reservations whatever. The testimony of defendant's agent, who cut the timber, tended to prove that when the cutting was done the defendant's manager did not dispute plaintiff's title, but gave the agent to understand that it belonged to plaintiff, but that some arrangement would be made about it; that plaintiff was then absent, and there was no conversation with him or his wife on the subject. The bill of exceptions certifies that no other evidence was given concerning the right to cut timber. Upon these facts the court held that the deed conveyed the right in the timber to plaintiff, and that he owned it.

Had no deed been made, it is agreed that the reservation would have prevailed. But a previous contract cannot contradict or control the operation of a deed. It was competent for defendant to relinquish any contract reservation, and a deed which grants and warrants without any reservation has that effect. We do not hold that if the deed were so made by some mistake within the cognizance of equity the mistake might not be corrected. Neither need we consider wheth-

¹⁰ For discussion of principles, see Clark on Contracts (2d Ed.), §§ 252, 253.

er, after such a deed, there might not be such dealings as to render such timber-cutting lawful, by license, express or implied. In this case there was no testimony tending to show that the deed was not supposed and intended to close up all the rights of the parties.

The judgment must be affirmed. The other justices concurred.

2. ALTERATION OF A WRITTEN INSTRUMENT

WOOD v. STEELE.

(Supreme Court of the United States, 1867. 6 Wall. 80, 18 L. Ed. 725.)

Mr. Justice SWAYNE delivered the opinion of the court.

The action was brought by the plaintiff in error upon a promissory note, made by Steele and Newson, bearing date October 11th, 1858, for \$3720, payable to their own order one year from date, with interest at the rate of two per cent. per month, and indorsed by them to Wood, the plaintiff.

Upon the trial it appeared that Newson applied to Allis, the agent of Wood, for a loan of money upon the note of himself and Steele. Wood assented, and Newson was to procure the note. Wood left the money with Allis to be paid over when the note was produced. The note was afterwards delivered by Newson, and the money paid to him. Steele received no part of it. At that time, it appeared on the face of the note, that "September" had been stricken out and "October 11th" substituted as the date. This was done after Steele had signed the note, and without his knowledge or consent. These circumstances were unknown to Wood and to Allis. Steele was the surety of Newson. It does not appear that there was any controversy about the facts. The argument being closed, the court instructed the jury, "that if the said alteration was made after the note was signed by the defendant, Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note." The plaintiff excepted. The jury found for the defendant, and the plaintiff prosecuted this writ of error to reverse the judgment.

Instructions were asked by the plaintiff's counsel, which were refused by the court. One was given with a modification. Exceptions were duly taken, but it is deemed unnecessary particularly to advert to them. The views of the court as expressed to the jury, covered the entire ground of the controversy between the parties.

The state of the case, as presented, relieves us from the necessity of considering the questions,—upon whom rested the burden of proof, the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank left after the month, exonerates the maker who has not assented to it.

Was the instruction given correct?

It was a rule of the common law as far back as the reign of Edward III, that a rasure in a deed avoids it. The effect of alterations in deeds was considered in *Pigot's Case*, 11 Coke, 27, and most of the authorities upon the subject down to that time were referred to. In *Master v. Miller*, 4 Term R. 320, 1 Smith, Lead. Cas. 1141, the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson, cannot affect the result. He had no authority to change the date.

The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed; another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed; and if it be not under seal, that he did not so promise. In either case, the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged.

The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong, must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned, deals with it accordingly.

The instruction was correct and the judgment is affirmed.¹¹

¹¹ By the Uniform Negotiable Instruments Law, § 124, it is provided: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers."

"But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

VI. Remedies on Breach of Contract¹²

1. DAMAGES

UNITED STATES v. BEHAN.

(Supreme Court of the United States, 1884. 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168.)

BRADLEY, J. Behan, the appellee and claimant, filed a petition in the court below, setting forth that on the twenty-sixth of December, 1879, one John Roy entered into a contract with C. W. Howell, major of engineers of the United States army, to make certain improvements in the harbor of New Orleans, (describing the same,) and that the claimant and two other persons named became bondsmen for the faithful performance of the work; that on February 10, 1881, the contract with Roy was annulled by the engineer office, and the bondsmen were notified that they had a right to continue the work under the contract if they desired to do so, and that the claimant complied with this suggestion and undertook the work; that he went to great expense in providing the requisite machinery, materials, and labor for fulfilling the contract, but that in September, 1881, it being found, by the report of a board of engineers, that the plan of improvement was a failure, without any fault of the claimant, the work was ordered to cease; that thereupon the claimant stopped all operations, and disposed of the machinery and materials on hand upon the best terms possible, and sent to the war department an account of his outlay and expenses, and the value of his own time, claiming as due to him, after all just credits and offsets, the sum of \$36,347.94, for which sum he prayed judgment. The claimant afterwards filed an amended petition, in which the various transactions and his operations under the contract were set forth in greater detail, showing, among other things, that the amount of his expenses for machinery and tools, for materials, and for labor and operations carried on, after deducting the proceeds realized from the sale of the plant remaining when the work was suspended, amounted to the sum of \$33,192.90. The petition further alleged that the claimant could have completed the work contemplated by the contract by a further expense of \$10,000, and that the amount which would then have been due therefor would have been \$52,000, leaving a profit to him of \$8,807.10.

The petition concluded as follows: "Your petitioner therefore respectfully shows that his reasonable and necessary expenditures up-

¹² For discussion of principles, see Clark on Contracts (2d Ed.) §§ 256, 257, 260, 262, 264, 265.

on the work above described amounted to \$33,195.92, which sum represents the losses actually sustained by petitioner by reason of the defendants' breach of the contract. And petitioner further sets forth that the reasonable and legitimate profits which he might have obtained but for the said breach of contract may be properly computed at \$8,807.10, assuming \$52,000 as the amount to be paid for the completed work. And petitioner further shows that he has not received one dollar from the defendants on account of said work, but that his claim and accompanying accounts, presented to the engineer department, have been transmitted to this court by the secretary of war. Your petitioner therefore alleges that he is entitled to receive from the United States the sum of forty-two thousand dollars (\$42,000) over and above all just credits and offsets. Wherefore he prays judgment for that amount."

The court of claims found the material facts to be substantially as stated in the petition. The contract of Roy is set forth in full in the findings, from which it appears that the contracting party was required to furnish and lay down an artificial covering of cane-mats over the sloping portion of the riverbed of the Mississippi in front of the third district of New Orleans, to extend outwards to a depth in the river not exceeding 100 feet, and to be paid therefor at the rate of 65 cents per square yard. The court finds that Roy prosecuted the work under the contract during the year 1880, but his progress not being satisfactory to the engineer officers, the contract was formally annulled and the bondsmen notified, as stated in the petition. In March, 1881, Behan, the claimant, gave notice to Maj. Howell that he would undertake the work, and at his request the major gave him a description of the work to be done, estimated as not exceeding 77,000 or 80,000 square yards, which, at the contract price, would amount to from \$50,000 to \$52,000.

The court further finds as follows: "The contract was of such a character as to require extensive preparations and a large initial expenditure. The claimant made the necessary preparations for carrying on the work to completion, and in procuring boats, tools, materials, and apparatus for its prosecution. He engaged actively in carrying out the contract on his part, incurred large expenditure for labor and materials, and had for some time proceeded with the work when the undertaking was abandoned by the defendants and the work stopped, without fault of the claimant, as set forth in the following letters." Then follows a copy of correspondence between the officers and the department of engineers, showing that a board of engineer officers was appointed to examine and report upon the plan of improvement under which the work of the claimant was being carried on, and that this board, on the twenty-third of September, 1881, reported their unanimous opinion that the object sought to be accomplished by the improvement had not been attained, and that under the then existing plan of operations it could not be attained. On the twenty-ninth of

September, 1881, the claimant received notice to discontinue the work, which he did at once, and gave Maj. Howell notice to that effect, and called his attention to the exposed situation of the machinery, materials, and other property on hand, and requested instructions respecting the same. No instructions appear to have been given.

The court then finds as follows:

"The claimant thereupon closed up his work and sold the materials which he had on hand. Nothing has been paid to him for work, materials, or losses. The actual and reasonable expenditures by the claimant in the prosecution of his work, together with his unavoidable losses on the materials on hand at the time of the stoppage by the defendants, were equal to the full amount claimed therefor in his petition—\$33,192.20. It does not appear from the evidence thereon on the one side and the other whether or not the claimant would have made any actual profit over and above expenditures, or would have incurred actual loss had he continued the work to the end and been paid the full contract price therefor.

"Conclusion of Law. Upon the foregoing findings of facts the court decides as a conclusion of law that the claimant is entitled to recover the sum of \$33,192.20."

The government has appealed from this decree, and complains of the rule of damages adopted by the court below. Counsel contend that, by making a claim for profits, the claimant asserts the existence of the contract as opposed to its rescission; and that in such case the rule of damages, as settled in *Speed's Case*, 8 Wall. 77, 19 L. Ed. 449, is "the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract." And when such a claim is made, they contend that the burden of proof is on the claimant to show what the profits would have been; and as the court of claims expressly finds that it does not appear from the evidence whether or not the claimant would have made any profits, or would have incurred loss, therefore the claimant was not entitled to judgment for any amount whatever.

The manner in which the subject was viewed by the court of claims is shown by the following extract from its opinion: "Whatever rule may be adopted in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the action of the party in fault, viewing these elements with relation to each other. The profits and losses must be determined according to the circumstances of the case and the subject-matter of the contract. The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract price, and the estimated

pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken in consideration. Sickels' Case, 1 Ct. Cl. 214; Speed's Case, 2 Ct. Cl. 429, affirmed on appeal 8 Wall. 77, 19 L. Ed. 449, and 7 Ct. Cl. 93; Wilder's Case, 5 Ct. Cl. 468; Bulkley's Case, 7 Ct. Cl. 543, 19 Wall. 37, 22 L. Ed. 62, and 9 Ct. Cl. 81; Parish's Case, 100 U. S. 500, 25 L. Ed. 763; Field's Case, 16 Ct. Cl. 434; Moore & Krone's Case, 17 Ct. Cl. 17; Power's Case, 18 Ct. Cl. 263, decided at this term; *Masterton v. City of Brooklyn*, 7 Hill (N. Y.) 71, 42 Am. Dec. 38. The amount of the claimant's unavoidable expenditures and losses already incurred are set forth in the findings. But we can give him nothing on account of prospective profits, because none have been proved. So, for the same reason, we can deduct nothing from his expenditures on account of prospective losses which he might have incurred had he not been relieved from completing his contract. This leaves his expenditures as the only damage proved to have resulted to him from the defendant's breach of contract, and are, therefore, the proper measure of damages under all the circumstances of the case."

We think that these views, as applied to the case in hand, are substantially correct. The claimant has not received a dollar, either for what he did, or for what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact. It will not be presumed. The court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses.

The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely,—First, what he has already expended towards performance, (less the value of materials on hand;) secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language

of Chief Justice Nelson, in the case of *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.) 69, 42 Am. Dec. 38, they are "the direct and immediate fruits of the contract," they are free from this objection; they are then "part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation." Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary.

The rule, as stated in *Speed's Case*, is only one aspect of the general rule. It is the rule as applicable to a particular case. As before stated, the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damage—actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. If he goes also for profits, then the rule applies as laid down in *Speed's Case*, and his profits will be measured by "the difference between the cost of doing the work and what he was to receive for it," etc. The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought a recovery for outlay is included and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits. When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend, (including his own services,) after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that

the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract.

It is unnecessary to review the authorities on this subject. Some of them are referred to in the extract made from the opinion of the court below; others may be found referred to in Sedgwick on the Measure of Damages, and in Smith's Leading Cases, vol. 2, p. 36, etc., (notes to *Cutter v. Powell*;) Add. Cont. §§ 881, 897. The cases usually referred to, and which, with many others, have been carefully examined, are, *Planche v. Colburn*, 5 Car. & P. 58; S. C. 8 Bing. 14; *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Goodman v. Pocock*, 15 Q. B. 576; *Hadley v. Baxendale*, 9 Ex. 341; *Fletcher v. Tayleur*, 17 C. B. 21; *Smeed v. Foord*, 1 El. & El. 602; *Inchbald v. Western Coffee Co.*, 17 C. B. (N. S.) 733; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, and the case of *U. S. v. Speed*, *supra*.

It is to be observed that when it is said in some of the books that where one party puts an end to the contract the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a quantum meruit; this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But, surely, the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred.

The particular form of the petition in this case ought not to preclude the claimant from recovering what was fairly shown by the evidence to be the damage sustained by him. Though it is true that he does pray judgment for damages arising from loss of profits, yet he also prays judgment for the amount of his outlay and expenses, less the amount realized from the sale of materials on hand. The claim for profits, if not sustained by proof, ought not to preclude a recovery of the claim for losses sustained by outlay and expenses. In a proceeding like the present, in which the claimant sets forth by way of petition a plain statement of the facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself sub-

stantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition.

We think that the judgment of the court of claims was right, and it is affirmed.

2. SPECIFIC PERFORMANCE

WM. ROGERS MFG. CO. v. ROGERS.

(Supreme Court of Errors of Connecticut, 1890. 58 Conn. 356, 20 Atl. 467. 7 L. R. A. 779, 18 Am. St. Rep. 278.)

This was a suit to enjoin the violation of a contract between Frank W. Rogers and the Wm. Rogers Manufacturing Company and the Rogers Cutlery Company as follows:

"(1) That said companies will employ said Rogers in the business to be done by said companies, according to the stipulations of said agreement, for the period of twenty-five years therein named, if said Rogers shall so long live and discharge the duties devolved upon him by said Watrous as general agent and manager of the business to be done in common by said companies, under the directions and to the satisfaction of said general agent and manager; it being understood that such duties may include traveling for said companies, whenever, in the judgment of said general agent, the interest of the business will be thereby promoted.

"(2) The said companies agree to pay said Rogers for such services so to be rendered, at the rate of \$1,000 per year for the first five years of such services, and thereafter the same or such larger salary as may be agreed upon by said Rogers and the directors of said companies, said salary to be in full during said term of all services to be rendered by said Rogers, whether as an employé or an officer of said companies, unless otherwise agreed.

"(3) The said Rogers, in consideration of the foregoing, agrees that he will remain with and serve said companies under the direction of said Watrous, as general agent and manager, including such duties as traveling for said companies, as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies, as said companies may desire to have him perform at the salary hereinbefore named for the first five years and at such other or further or different compensation thereafter during the remainder of the twenty-five years as he, the said Rogers, and the said companies may agree upon.

"(4) The said Rogers during said term stipulates and agrees that he will not be engaged or allow his name to be employed in any man-

ner in any other hardware, cutlery, flatware, or hollow-ware business either as manufacturer or seller, but will give, while he shall be so employed by said companies, his entire time and services to the interests of said common business, diminished only by sickness, and such reasonable absence for vacations or otherwise as may be agreed upon between him and said general agent."

The complaint was held insufficient, and the plaintiffs appealed.

ANDREWS, C. J. Contracts for personal service are matters for courts of law, and equity will not undertake a specific performance. 2 Kent, Comm. 258, note b; Hamblin v. Dinneford, 2 Edw. Ch. (N. Y.) 529; Sanquirico v. Benedetti, 1 Barb. (N. Y.) 315; Haight v. Badgeley, 15 Barb. (N. Y.) 499; De Rivaflinoli v. Corsetti, 4 Paige, (N. Y.) 264, 25 Am. Dec. 532. A specific performance in such cases is said to be impossible because obedience to the decree cannot be compelled by the ordinary processes of the court. Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service.

The courts in this country and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. 3 Wait, Act. & Def. 754; Marble Co. v. Ripley, 10 Wall. 340, 19 L. Ed. 955; Burton v. Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171; De Pol v. Sohlke, 7 Rob. (N. Y.) 280; Kemble v. Kean, 6 Sim. 333; Baldwin v. Society, 9 Sim. 393; Fothergill v. Rowland, L. R. 17 Eq. 132. The courts in both countries have, however, receded somewhat from the latter conclusion, and it is now held that where a contract stipulates for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages. 2 Story, Eq. Jur. § 958a; 3 Wait, Act. & Def. 754; 3 Pom. Eq. Jur. § 1343; California Bank v. Fresno Canal, etc., Co., 53 Cal. 201; Singer Sewing-Machine Co. v. Union Button-Hole Co., 1 Holmes, 253, Fed. Cas. No. 12,904; Lumley v. Wagner, 1 De Gex, M. & G. 604; Railroad Co. v. Wythes, 5 De Gex, M. & G. 880; Montague v. Flockton, L. R. 16 Eq. 189.

The contract between the defendant and the plaintiffs is made a part of the complaint. The services which the defendant was to perform for the plaintiffs are not specified therein, otherwise than that they were to be such as should be devolved upon him by the general manager; "it being understood that such duties may include traveling

for said companies whenever, in the judgment of said general agent, the interests of the business will be thereby promoted;" and also "including such duties as traveling for said companies as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies as said companies may desire to have him perform." These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special, or unique, or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary intelligence and fair learning. If this was all there was in the contract it would be almost too plain for argument that the plaintiffs should not have an injunction.

The plaintiffs, however, insist that the negative part of the contract, by which the defendant stipulated and agreed that he would not be engaged in or allow his name to be employed in any manner in any other hardware, cutlery, flatware or hollow-ware business, either as a manufacturer or seller, fully entitles them to an injunction against its violation. They aver in the complaint, on information and belief, that the defendant is planning with certain of their competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed in connection with such business as a stamp on the ware manufactured; and they say such use would do them great and irreparable injury. If the plaintiffs owned the name of the defendant as a trade-mark, they could have no difficulty in protecting their ownership; but they make no such claim, and all arguments or analogies drawn from the law of trade-marks may be laid wholly out of the case.

There is no averment in the complaint that the plaintiffs are entitled to use, or that in fact they do use, the name of the defendant as a stamp on the goods of their own manufacture, nor any averment that such use, if it exists, is of any value to them. So far as the court is informed, the defendant's name on such goods as the plaintiffs manufacture is of no more value than the names of Smith or Stiles or John Doe. There is nothing from which the court can see that the use of the defendant's name by the plaintiffs is of any value to them, or that its use as a stamp by their competitors would do them any injury other than such as might grow out of a lawful business rivalry. If by reason of extraneous facts the name of the defendant does have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals would do them some special injury, such facts ought to have been set out so that the court might pass upon them. In the absence of any allegation of such facts we must assume that none exist.

The plaintiffs also aver that the defendant intends to make known to their rivals the knowledge of their business, of their customers, etc., which he has obtained while in their employ. But here they have

not shown facts which bring the case within any rule that would require an employé to be enjoined from disclosing business secrets which he has learned in the course of his employment, and which he has contracted not to divulge. *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664.

There is no error in the judgment of the superior court. The other judges concurred.

3. DISCHARGE OF RIGHT OF ACTION

(A) By Accord and Satisfaction

HARRISON v. HENDERSON.

(Supreme Court of Kansas, 1903. 67 Kan. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386.)

Action by Harvey Henderson, administrator, against T. W. Harrison. Judgment for plaintiff, and defendant brings error. Affirmed.

Henderson was a resident of Pittsburg, Pa., and was appointed administrator of the estate of Samantha Johnson, deceased, by the court there. As such administrator, he had for collection two notes secured by mortgages in Topeka. He employed Harrison, who is an attorney residing in Topeka, for the purpose of collecting these notes by foreclosure. The account growing out of that relationship continued from May, 1894, until March, 1898, during which time the administrator remitted various sums of money to apply on fees and expenses, and Harrison made collections, so that altogether there came to his hands \$1,210. He expended various sums in payment of taxes, etc., and on March 10, 1898, made a statement to Henderson of the account embracing these expenditures and charges for attorney's fees, in the total sum, as then claimed by him, of \$739.20, and on that date, as shown by this account, struck a balance of \$470.30, and remitted the same by draft. This draft was drawn to Harrison's order, and indorsed by him, "Pay Harvey Henderson Administrator estate of Samantha Johnson dec'd. bal.," and sent to Henderson, accompanied by a letter in which he said: "I enclose you statement in the Samantha Johnson estate matters and draft on N. Y. for balance of \$470.30 on that matter." This draft Henderson collected, but, refusing to consider it as a payment in full, he, in September, 1899, brought this action upon account for moneys had and received, giving therein credit for the expenditures—\$125 as attorney's fees and the amount of the remittance—and prayed judgment for a balance of \$366.

Harrison answered, setting up the facts relative to the remittance as hereinbefore mentioned, and pleaded the same as an accord and satisfaction. Plaintiff replied, admitting the receipt of the statement, but denied the correctness of the account as pleaded by the defendant. The matter was referred by consent to Hon. J. D. McFarland to report upon the facts and the law. Upon the hearing before the referee, the entire matter as to the correctness of the charges made by the defendant Harrison for his services as attorney was gone into, and evidence heard pro and con. The referee reported that the charges as made by him were excessive, and that he owed to the plaintiff the sum of \$235, with interest from September 9, 1898, and, as a conclusion of law, that "the retention and collection of the draft for \$470.30 sent by the defendant to the plaintiff March 10th, 1898, together with the letter and statement therewith, was not under the facts of this case an accord and satisfaction, or the settlement of the matters between plaintiff and defendant mentioned in said statement, and does not bar the plaintiff from recovering any sum that otherwise would be due him on account of said matters," and, further, that he recover said sum of \$235 found due. This report of the referee was confirmed by the district court over the objections of the defendant, and judgment rendered thereon against defendant, who is now here seeking a reversal of the same.

CUNNINGHAM, J. (after stating the facts). There are two questions raised by the plaintiff in error:

(1) One upon the facts, it being claimed that the report of the referee and judgment of the district court upon the facts is not binding upon this court, and that, as all of the evidence introduced before the referee is in the record here, we may look into it as though we were trying the case *de novo*, and that upon doing so we will come to a conclusion other and different than did the referee and trial court. Granting that the findings of the referee and their approval by the district court are not binding here, we have looked into the evidence enough to enable us to conclude that the findings are fully warranted thereby, and are such as meet with our approval.

(2) The main contention in the case is that there was an accord upon and a satisfaction of the demands arising between the parties in this case. That inasmuch as the account submitted on the 10th day of March, 1898, struck what was denominated therein as a "balance," and as the indorsement upon the draft indicated that it was for such balance, and as the letter accompanying the same contained the suggestion that a balance was therein remitted, as a matter of law Henderson could not accept such draft under these circumstances and afterwards claim a further payment.

An accord is an agreement, an adjustment, a settlement of former difficulty, and presupposes a difference, a disagreement, as to what is right. A satisfaction, in its legal significance in this connection, is a

performance of the terms of the accord. If such terms required a payment of a sum of money, then that such payment has been made.

In this case there is no evidence of any disagreement between the parties prior to the sending of the account and remittance accompanying it. Plaintiff in error contends, however, that, because such remittance was denominated "a balance," its acceptance constituted an accord and satisfaction, and cites a number of authorities where courts have held that a remittance made as a balance, and the acceptance of the same, amounted to an accord and satisfaction. These cases have all been carefully examined, and in every one there appears to have been a prior disagreement, a contention as to what amount was due, so that a remittance, being denominated a balance, carried with it to the creditor, as a fair conclusion, that it was intended by the debtor to be in full of all demands. Without the requirement being made by the debtor that if the creditor accepts and retains the proffered amount he must do so in full satisfaction of his demand, or without accompanying and surrounding circumstances fairly indicating that such was the purpose and object of the debtor in making the remittance, a creditor cannot be said to have so accepted a payment. To constitute an accord and satisfaction in law, dependent upon the offer of the payment of money, it is necessary that the money should be offered in full satisfaction of the demand or claim of the creditor, and be accompanied by such acts or declarations as amount to a condition that if the money is accepted it is to be in full satisfaction, and be of such a character as that the creditor is bound to so understand such offer.

In *Kingsville Preserving Co. v. Frank*, 87 Ill. App. 586, it is held: "To constitute an accord and satisfaction of a claim unliquidated and in dispute, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted, it is to be in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition."

In *Pottlitzer et al. v. Wesson et al.*, 8 Ind. App. 472, 35 N. E. 1030, a debtor sent his check in payment of an account. It was held that this did not necessarily imply that if the creditors accepted the check they must have understood that their accepting it was in full of their claim, hence there was no accord and satisfaction thereby shown.

In *Perkins v. Headley*, 49 Mo. App. 556, it was held: "Where a controversy as to the amount of the indebtedness exists between a creditor and his debtor, and the debtor tenders to the creditor the amount which he claims is due, on condition that the acceptance of it should discharge the entire demand, the acceptance will constitute an accord and satisfaction as a matter of law, since one who accepts a conditional tender assents to the condition." But it was held in this case "that the mere fact that the plaintiff received from defendant less

than the amount of his claim, in silence, and with knowledge that defendant claimed to be indebted to him only to the extent of the payment made, did not conclusively and as a matter of law establish an accord and satisfaction."

In *Beckman v. Birchard*, 48 Neb. 805, 67 N. W. 784, where a payment of money was made as a balance due, and the claim made that this was an accord and satisfaction, it was held: "A creditor who accepts money tendered by the debtor unconditionally, does not by that act estop himself from maintaining an action to recover any further sum that may be due."

In *Kruger v. Geer*, 26 Misc. Rep. 772, 56 N. Y. Supp. 1015, an attorney wrote to his client: "Inclosed you will find a statement of account, my receipted bill for professional services since our last statement, and a check for \$166.86, being the balance due you." No other indication being found that this was intended as full settlement, the court held "that the fact that plaintiff retained the check and receipted statement, where the check contained no condition that it should be received in full payment, is insufficient to show an accord and satisfaction."

It was ruled in *Brigham v. Dana*, 29 Vt. 1: "A sum of money paid and received will not operate as a full settlement, although the payer so intended it, and would not have paid it if he had not understood that such would be its effect, but in reference to which he made no such express condition, if the payee did not so understand it, and would not have received it upon such an understanding."

See, also, 1 Cyc. 332.

An accord and satisfaction is the result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor. A simple tender of a balance as shown by an account tendered by the debtor, does not carry with it an implication or conclusion that by such tender the debtor paid, or that the creditor agreed to receive, the same in full of the amount due, where there had been no prior disagreement or discussion as to what was actually due.

Surely it cannot be claimed that such was the condition in the case at bar. It was shown in the evidence that the administrator had no knowledge of fees properly chargeable by attorneys in this state for services rendered, or that he even knew of the character and extent of the services which had been rendered. The sender of the check did not require its acceptance in full of all demands upon him as a condition precedent to its acceptance. The circumstances better warrant the conclusion that the sender was saying, "In my judgment these fees charged are correct, and a proper remuneration for the services which

I have rendered, and, in accordance with this view, the amount sent you is the balance that is due. If, however, after you have investigated, you do not so conclude, we will hereafter have an adjustment of any difference that may then arise," rather than, "I will give you no opportunity whatever to inquire as to the correctness of the charges I have made, and, if you accept the draft, it must foreclose all question."

The former view is most just to the plaintiff in error, and it is the position that an honorable and fair-minded attorney would take. Under our statute, he at best was only entitled to a lien upon the moneys which had come into his hands, by virtue of his employment, to secure his properly charged fees. It was his duty to at once remit all such moneys, less only such properly charged fees—if, indeed, we may make this concession. He could not be permitted to charge extortionate fees, remit the balance as per his conclusion, and estop his client thereby. We are fully persuaded in this case there was no accord and satisfaction, and that the defendant in error is entitled to recover the amount found due by the referee.

The judgment of the district court will be affirmed. All the Justices concurring.

(B) By Lapse of Time

WARREN v. CLEVELAND et al.

(Supreme Court of Tennessee, 1903. 111 Tenn. 174, 76 S. W. 910, 102
Am. St. Rep. 749.)

Suit by J. C. Warren, as executor, etc., against M. N. Cleveland and others. From a decree of the Court of Chancery Appeals for defendants, plaintiff appeals.

NEIL, J. In the course of administration of the estate of D. H. Cleveland a controversy arose over the claim of Mrs. Hudson for about \$1,200.

It was insisted by the executor that this claim was barred by the statute of limitations, and the chancellor found in favor of this contention.

After stating that the consideration of this claim was the boarding of Mrs. Hudson's younger sisters, and that the justice of the debt had been proved, the Court of Chancery Appeals found as follows:

"But we are satisfied from the proof that her claim is clearly barred by the statute of limitations, which was interposed by the executor

of her father to the allowance of the claim. It is true there is some proof in the record, undisputed, that Mr. Cleveland, her father, recognized this claim up till a short time before his death; but the proof fails, clearly, we think, to show that he made any promise to pay it within six years before his death."

Upon this finding of facts the Court of Chancery Appeals ruled the law as follows:

"The law is that the mere recognition of a claim or debt will not prevent the operation of the statute of limitation against it. It requires not only recognition, but a distinct and unconditional promise to pay it, to prevent the running of the statute."

The point of the assignment is that a mere recognition of the debt is sufficient to take the case out of the operation of the statute.

We have been unable to find sufficient authority in our decisions to support this contention. The cases that come nearest to it are the following: *Harwell v. McCulloch*, 2 Overt. 275, 278; *Russel v. Gass*, Mart. & Y. 271-274; *Partee v. Badget*, 4 Yerg. 174, 26 Am. Dec. 220; *Hunter v. Starkes*, 8 Humph. 656; *Luna v. Edmiston*, 5 Sneed, 160. All of these cases, except *Hunter v. Starkes*, state, in substance, that an unconditional acknowledgment of the indebtedness is sufficient to remove the bar of the statute. In the latter case (*Hunter v. Starkes*) it is held that an admission that the amount claimed by the contract has never been paid is as sufficient for the purpose as a direct promise to pay. This case is substantially an authority for the position assumed by counsel for Mrs. Hudson, and if it stood alone, or even if it stood only with the other cases just cited, we should be content to hold that a recognition of the debt within six years would be sufficient. But we have a long line of cases which hold that, in order to remove the bar of the statute, there must be either an express promise to pay, or an acknowledgment of the debt accompanied by the expression of a willingness to pay it. *Jordan v. Jordan*, 85 Tenn. 566, 3 S. W. 896; *Shown v. Hawkins*, 85 Tenn. 216, 2 S. W. 34; *Malone v. Searight*, 8 Lea, 91-94; *Fuqua v. Dinwiddie*, 6 Lea, 648; *Roller v. Bachman*, 5 Lea, 156-157; *Bachman v. Roller*, 9 Baxt. 409-412, 40 Am. Rep. 97; *Rogers v. Southern*, 4 Baxt. 67-69; *McFerrin v. Woods*, 3 Baxt. 242-247; *Allison v. Bradford*, 1 Tenn. Cas. 619-621; *Broddie v. Johnson*, 1 Sneed, 465; *Butler v. Winters*, 2 Swan, 92; *Ott v. Whitworth*, 8 Humph. 494-496; *Hale v. Hale*, 4 Humph. 183-185; *Thompson v. French*, 10 Yerg. 456; *Crowder v. Nichol*, 9 Yerg. 453-455; *Belote v. Wynne*, 7 Yerg. 534.

The weight of authority is very strongly in favor of the rule as last stated. We do not think that a finding merely that the deceased "recognized this claim up to a short time before his death" is sufficient. There would have to be other facts stated, showing more distinctly the character of the recognition, and that it amounted either to a di

rect promise, or an acknowledgment of the existence of the debt, coupled with an expression of a willingness to pay it.

While, therefore, we do not fully agree with the Court of Chancery Appeals in its statement of the law that there must be an express promise to pay in order to take a debt out of the bar of the statute of limitations, yet, under the authorities above cited, we are constrained to hold that that court reached a correct conclusion as to the existence of the bar, and that the decree must be affirmed.

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